NO. 92-1349

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

ERNEST D. SHARP,
Petitioner

versus

JOHNSON BROTHERS CORPORATION, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Does an order approving a settlement of a disputed claim under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901, preclude recovery under the Jones Act, 46 U.S.C. 688, when the order is entered by consent and without stipulation, adjudication, or determination of jurisdiction, status, or compensability under the LHWCA, and when the settlement specifically reserves the claimant's right to proceed under the Jones Act?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Ernest D. Sharp and the respondents Johnson Brothers Corporation, St. Paul Fire & Marine Insurance Company, and Centennial Insurance Company. Wausau Insurance Company appeared as an intervenor in the proceedings below but is not a party to these proceedings.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ERNEST D. SHARP,
Petitioner

versus

JOHNSON BROTHERS CORPORATION, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Ernest D. Sharp respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on November 10, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 973 F.2d 423 and is reprinted in the appendix hereto.

The oral reasons for judgment of the United States District Court for the Eastern District of Louisiana are unreported but have been transcribed and appear in the index hereto.

The settlement and order of the Administrative Law Judge, issued under 33 U.S.C. 908(i), in the Department of Labor proceedings, OWCP No. 7-102714, are reproduced in the appendix hereto.

JURISDICTION

The petitioner invoked the maritime jurisdiction of the federal courts pursuant to 28 U.S.C. 1333 and federal jurisdiction pursuant to 46 U.S.C. 688. On August 27, 1991, a final judgment was entered against the petitioner pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

The petitioner took an appeal from this judgment and on September 25, 1992, the United States Court of Appeals for the Fifth Circuit issued an opinion affirming the decision of the United States District Court for the Eastern District of Louisiana and entered judgment against the petitioner.

On October 9, 1992, the petitioner filed a Suggestion for Rehearing En Banc. The Fifth Circuit treats a suggestion for rehearing en banc as a petition for panel rehearing. ***Gonzales v. Southern Pacific Transportation Co.,*** **773 F.2d 637 (5th Cir. 1985).** On November 10, 1992, the Fifth Circuit entered judgment against the petitioner denying his petition for panel rehearing. ***Missouri v. Jenkins,*** **495 U.S. 45, 110 S.Ct. 1660, 109 L.Ed 2d 50 (1990).**

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

STATUTE INVOLVED

33 U.S.C. 908(i)(1): Whenever the parties to any claim for compensation under this Chapter, including survivors benefits, agree to a settlement, the deputy commissioner or administrative law judge shall approve the settlement within thirty days unless it is found to be inadequate or

procured by duress. Such settlement may include future medical benefits if the parties so agree. No liability of any employer, carrier, or both for medical, disability, or death benefits shall be discharged unless the application for settlement is approved by the deputy commissioner or administrative law judge. If the parties to the settlement are represented by counsel, then agreements shall be deemed approved unless specifically disapproved within thirty days after submission for approval.

STATEMENT OF THE CASE

Ernest Sharp was employed by Johnson Brothers and worked as a piledriver aboard a fleet of barges and a tugboat chartered by that company. In November of 1985, while Sharp was working aboard the tugboat, a barge crane dropped a load of angle iron on him, causing injuries to his back, knee and ankle.

There were in force and effect at the time four separate insurance policies procured by Johnson Brothers to cover its activities. St. Paul and Marine Insurance Company (St. Paul) provided protection and indemnity for the tug operations; Centennial Insurance Company (Centennial) provided primary protection and indemnity coverage for the barges; Wausau Insurance Company (Wausau) provided coverage for worker's compensation and general employer's liability.

Following the accident, Johnson Brothers and Wausau filed a notice of injury with the U.S. Department of labor (DOL) and voluntarily commenced benefits under the LHWCA. Sharp took no action regarding enforcement of his potential rights until November 1986 when, following knee and back surgery, he filed suit under the Jones Act, 46 U.S.C. 688, in the United States District Court for the Eastern District of Louisiana.

St. Paul answered and defended Johnson Brothers on the Jones Act claim, but with a reservation of rights. Centennial, brought in by third party demand, denied coverage from the outset. In the district court suit, Johnson Brothers, St. Paul, and Centennial urged that Sharp was not a seaman under the Jones Act.

In August of 1987, Wausau terminated payments under the LHWCA. Sharp, as a result of financial hardship arising from the termination of payments, for the first time filed a claim with the United States Department of Labor to preserve his rights in that forum. He likewise demanded payment of maintenance and cure from Johnson Brothers and St. Paul. From August of 1987 until October 1989, Sharp received neither longshoremen's compensation nor seaman's maintenance. At the Department of Labor, Johnson Brothers and Wausau urged that Sharp was a seaman and thus not eligible for compensation under the LHWCA.

Following the filing of his Jones Act suit in November of 1986, trial of Sharp's case was continued four times upon motion of the district court. In June of 1989, after three (3) days of trial on status only, the district court granted a directed verdict against Sharp on the grounds that the barges were not vessels and that he was not a seaman. Sharp appealed this decision to the United States Court of Appeals for the Fifth Circuit and on November 21, 1990, that Court reversed and remanded the case to the District Court, holding that Sharp had presented sufficient evidence for a finding of seaman status. ***Sharp v. Johnson Bros. Corp.*, 917 F.2d 885 (5th Cir. 1990).**

Following trial and while awaiting a final judgment which to appeal, Sharp entered negotiations with Johnson Brothers and Wausau for settlement of whatever claims he might have under the LHWCA. Sharp made it clear, as

evidenced by settlement letters in the record, that he intended to appeal the District Court's decision that he was not a seaman; but he could not continue to pursue his Jones Act remedies without sustenance for himself and his family.

On September 20, 1989, Sharp, Johnson Brothers and Wausau agreed upon a settlement . In exchange for a lump sum payment, Sharp agreed to release Wausau from all liability and to release Johnson Brothers from any liability that it may have under the LHWCA and from any uninsured tort liability. The settlement agreement, executed on October 5, 1989, specifically reserved Sharp's rights to pursue Johnson Brothers under under the Jones Act through execution of judgment, to the extent that Johnson Brothers was insured by St. Paul and/or Centennial. The settlement agreement further provided that Sharp would not receive a double recovery, since he would be required by the terms of the agreement to reimburse his employer and its compensation insurer in full all compensation received, should he eventually obtain a judgment and recovery under the Jones Act.

Since Johnson Brothers' liability under the LHWCA could be discharged only by processing the settlement through the Department of Labor, Wausau's attorneys drafted and submitted a 33 U.S.C. 908(i) settlement application. Just as in the receipt and release, the parties to the 8(i) application made it clear that the question of Sharp's status should be determined by a jury in district court. The Admisintrative Law Judge is directed by Section 908(i) to approve the formal settlement agreement unless it is found "inadequate or procured by duress." Approval by the Administrative Law Judge was not required by section 908(i)(1), which provides that when the parties are represented by counsel agreements shall be deemed approved unless specifically disapproved within thirty (30)

days after submission for approval, without further action by the Department of Labor or Administrative Law Judge.

Section 908(i) does not require that the Deputy Commissioner of the Department of Labor or the Administrative Law Judge make determinations of jurisdiction, status, or compensability. Accordingly, they were not asked to make nor did they make any such determinations in approving the settlement agreement. In reaching the determination that the settlement agreement was not "inadequate or procured by duress," the Administrative Law Judge did not hold a hearing, take testimony, or make findings regarding any fact, jurisdiction, status, or compensability under the LHWCA. The settlement agreement was approved and a pro forma order was issued by the Department of Labor that the agreement was not "inadequate or procured by duress." **33 U.S.C. 908(i).**

Upon remand of the Jones Act case to the United States District Court for the Eastern District of Louisiana and upon motion for summary judgment, the District Court held that Sharp's settlement of his claim under the LHWCA constituted an "election of remedies", which precluded recovery under the Jones Act. Sharp timely appealed this decision to the United States Court of Appeals for the Fifth Circuit. On September 25, 1992, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court, holding that a settlement agreement that is approved by an administrative law judge constitutes a formal award that bars relief under the Jones Act. ***Sharp v. Johnson Bros. Corp.*, 973 F.2d 423, (5th Cir. 1992).** Although the Court acknowledged that the question of LHWCA coverage was never litigated in an adversarial proceeding and that consent judgments do not give rise to collateral estoppel. ***Hughes v. Santa Fe Int'l, Corp.*, 847 F.2d 239 (5th Cir. 1988),** the Court reasoned that the Administrative Law Judge's approval of the settlement agree-

ment and his order to pay pursuant to the settlement constituted a "formal award". The Court held that receipt of benefits pursuant to a formal award under any circumstances bars recovery under the Jones Act.

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit failed to follow and adhere to the reasoning and policy of this Court as stated in *Southwest Marine, Inc. v. Gizoni.*

In *Southwest Marine, Inc. v. Gizoni,* ____U.S.____, 112 S. Ct. 486, 116 L.Ed.2d 205 (1991), This Court held unanimously that:

> It is by now "universally accepted" that an employee who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act.

112 S. Ct. 486, 493. The United States Court of Appeals for the Fifth Circuit distinguished the present case from *Gizoni* on the grounds that Sharp obtained a "formal award", albeit by consent and without an adjudication of his status. The United States Court of Appeals for the Fifth Circuit held that he was thereby precluded from pursuing his Jones Act remedies.

In failing to acknowledge the difference between a "formal award" and a Section 908(i)(1) settlement agreement, the United States Court of Appeals for the Fifth Circuit overlooked, or otherwise failed to account for, the legal basis for this Court's holding in *Gizoni*. There, this Court stated that acceptance of longshoremen benefits did not preclude a Jones Act recovery, "quite obviously, because the question of coverage has never actually been litigated."

112 S.Ct. 486, 494. Consequently, this basis for permitting the Jones Act claim to proceed would apply equally to the acceptance of benefits, to a settlement, or to a consent judgment - quite obviously, because in such cases, the question of coverage has "never actually been litigated". In Sharp's case before the Department of Labor, the question of status was, again, never stipulated, litigated, or adjudicated. The approval of the settlement agreement by the Administrative Law Judge, his so called "formal award" was nothing more than a consent judgment, without litigation of coverage.

According to principles long established by both this Court and by the federal courts, such judgments are not given preclusive effect, unless that is the intent of the parties. ***Kaspar Wire Works, Inc, v. Leco Engineering & Mach.,*** **575 F.2d 530 (5th Cir. 1978).** The Court's reasoning in ***Gizoni*** simply reflected these well established principles.

In ***Gizoni;*** this Court cited with approval ***Simms v. Valley Line Co.,*** **709 F.2d 409, 412, and nn. 3 and 5 (5th Cir. 1983)** and **G. Gilmore and C. Black, *The Law of Admiralty* 435 (2d ed. 1975).** The following passage is contained at the pages cited by this Court:

> Even the payment of benefits pursuant to a formal award in a contested proceeding is not necessarily fatal to the Jones Act action. The courts have shown themselves receptive to the argument that the award may have been made without a proper adjudication of the claimant's status as a harbor worker or seaman. **Gilmore & Black, supra, at 435; 709 F.2d 409, 412, n. 5.**

Relying upon the foregoing case law and learned treatises and the cited passage, this Court stated that the seaman's suit is not barred by anything less than the actual litigation and determination of the question of coverage. 112

S.Ct. at 494. Contrary to the holding of the United States Court of Appeals for the Fifth Circuit, it is not the receipt of benefits, nor an approved settlement, nor a pro forma award which bars suit; rather, it is a final judgment issued after actual litigation and determination of the claimant's status.

This Court in ***Gizoni,*** by its reference to the ***Simms*** case, to Gilmore & Black, and to Professor Larson's treatises on compensation, clearly drew a distinction between the various forms that a formal award can take. For a formal award to have preclusive effect, the issues of jurisdiction, coverage, and compensability must have been actually litigated and determined. A formal approval of a settlement agreement, although enforceable, is still just a settlement; it is not a formal award based on an adjudication of coverage. It can not be identical in effect to the conclusion reached by a judge after a trial; it does not reflect the considered judgment of a judicial officer. A formally approved settlement is forged by the parties alone as an adjustment of conflicting claims and is not a tempered determination of fact and law after the annealment of an adversary trial. ***Kaspar Wire Works, Inc, v. Leco Engineering & Mach.,*** 575 F.2d 530 (5th Cir. 1978).

This Court recognized this distinction; the United States Court of Appeals for the Fifth Circuit did not. The holding and precedential effect of the Fifth Circuit's decision is that all formal awards and/or judgments are created equal; and that all such awards are to be given preclusive effect, regardless of the circumstances - even when there has been no actual litigation and judicial determination of the issues. This holding directly conflicts with the reasoning of this Court's decision in ***Gizoni.***

The Fifth Circuit stated that to allow a claimant to accept a settlement from a compensation insurer would

be unfair to the tort insurer and would discourage settlements. However, in the case before the Court, any inequity benefited the tort insurers to the detriment of the employer and its compensation insurer. By denying insurance coverage, by refusing to pay maintenance and cure, by delaying the litigation, and by refusing to settle, the tort insurers forced the employer, its compensation insurer, and the claimant into a settlement of the LHWCA claims. By giving this settlement a preclusive effect, where none was intended by the parties, the Fifth Circuit allowed the tort insurers to escape certain Jones Act liability. ***Sharp v. Johnson Brothers Corp.,*** **917 F.2d 885 (5th Cir. 1990).**

In the maritime and offshore industries, there are numerous cases where the claimant falls within the zone of uncertainty between the Jones Act and the LHWCA. In many such cases, both the employer and the injured worker may determine that it is in their respective best interests to settle the LHWCA claims and litigate the Jones Act claims. All LHWCA settlements must go through the 908(i) process and are followed by a pro forma award. If such settlements and awards are given preclusive effect, thereby releasing the employer's tort insurers, the ability of the employer, the compensation insurer, and the claimant to forge such agreements will be forever chilled, moreover, prohibited. See ***Zenith Radio Corp. v. Hazeltime Research, Inc.,*** **401 U.S. 321, 91 S.Ct. 795, 28 L.Ed. 2d 77 (1971).**

The decision of the United States Court of Appeals for the Fifth Circuit suggests that, although a claimant may pursue two remedies, he may receive only one award; and suggests further that there may be the threat of double recovery. The United States Court of Appeals for the Fifth Circuit ignored the terms of the settlement between Sharp and Wausau. By the terms of the settlement agreement, Sharp must pay Johnson Brothers and Wausau in full for

all compensation previously received, if and when he recovers from the tort insurers in the Jones Act case. Sharp and Wausau by contract did what the compensation act anticipates by law. As long as the threat of double recovery is removed, receipt of benefits, whether by voluntary payment, settlement, or award does not preclude subsequent recovery under the Jones Act. This proposition is stated clearly and unambiguously by this Court in ***Gizoni:***

> Moreover, the LHWCA clearly does not comprehend such a preclusive effect, as it specifically provides that any amounts paid to an employee for the same injury, disability or death pursuant to the Jones Act shall be credited against ***any liability imposed by the LHWCA.*** (Emphasis added) 112 S.Ct. 486, 494.

112 S.Ct. at 494.

The use of the phrase "any liability imposed by the LHWCA" is significant. Liability cannot be *imposed* other than by an order, award, or judgment. The holding of the United States Court of Appeals for the Fifth Circuit would not only preclude the claimant from recovering from the tort insurers; it would also preclude the compensation insurer from receiving the credit due. Congress and this Court did not intend such a preclusive effect.

The question, properly addressed and answered by this Court in ***Gizoni,*** but completely overlooked by the United States Court of Appeals for the Fifth Circuit, is whether there are circumstances under which a formal award will not preclude a Jones Act recovery. By this Court's plain language, relief under the Jones Act is not barred if "the question of coverage has never actually been litigated." In the case before the Court, the issues of jurisdiction, coverage, or compensability under the LHWCA were never litigated or determined.

II.

Giving a consent judgment a preclusive effect not intended by the parties conflicts with this Court's law of judgments.

The holding of the Court below carries with it implications which extend far beyond the field of maritime law and which may effect all cases of any nature in which parties to a suit attempt to forge a settlement. The Fifth Circuit essentially gave a settlement and consent judgment a preclusive effect not intended by the parties.

In so doing, the decision of the United States CCourt of Appeals for the Fifth Circuit is in direct conflict with the law of consent judgments as previously applied by this Court. ***Lawlor v. National Screen Service Corp.,*** **349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955);** ***United States v. ITT Continental Baking Co.,*** **420 U.S. 223, 95 S.Ct. 926, 43 L.ed.2d 148 (1975);** ***United States v. International Bldg. Co.,*** **345 U.S. 502, 73 S.Ct. 807, 97 L.Ed. 1182 (1952), rehearing denied, 345 U.S. 978, 73 S.Ct. 1120, 97 L.Ed. 1392 (1953).**

In ***United States v. International Bldg. Co.,*** **supra;** the Court stated:

> A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties.

345 U.S. 502, 506.

That case, like Sharp's, involved a pro forma judgment approving a settlement between the parties. The reason for this rule, simply stated, is justice:

> But unless we can say that they were an adjudication on the merits, the doctrine of estoppel by judgment would serve an unjust cause: it would become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits.

345 U.S. 502, 506.

The "formal award" given preclusive effect by the United States Court of Appeals for the Fifth Circuit was merely a consent judgment which ratified an agreement between the parties. The agreement reserved to Sharp the right to pursue his Jones Act remedies. The consent award was not an adjudication on the merits and should not therefore "forever foreclose inquiry into the merits." 345 U.S. 502, 506.

CONCLUSION

The Fifth Circuit's preclusion of the petitioner's Jones Act remedies by extension of the effect of a consent judgment, where no such preclusive effect was intended and where the precluded issues were never actually litigated or determined, conflicts with this Court's opinion in *Gizoni* and with the accepted law of judgments. The peti-

tioner respectfully requests issuance of a writ of certiorari for review.

Respectfully submitted:

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APPENDIX A

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ERNEST D.SHARP,
Plaintiff-Appellant,

WAUSAU INSURANCE COMPANY,
Intervenor-Appellant,

versus

JOHNSON BROTHERS CORPORATION,
ST. PAUL FIRE & MARINE INSURANCE COMPANY,
and CENTENNIAL INSURANCE COMPANY,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

ON SUGGESTION FOR REHEARING EN BANC

(Opinion September 25, 5 Cir., 1992, ____F.2d____)

(November 10, 1992)

Before POLITZ, Chief Judge, SMITH and BARKSDALE, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition

for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. Smith

United States Circuit Judge

REHG-8

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX B

Ernest D. SHARP,
Plaintiff-Appellant,

Wausau Insurance Company,
Intervenor-Appellant,

v.

JOHNSON BROTHERS CORPORATION,
St. Paul Fire & Marine Insurance Co.,
and Centennial Insurance Company,
Defendants-Appellees.

No. 91-3690

United States Court of Appeals,
Fifth Circuit.

Sept. 25, 1992.

Worker injured during reconstruction of train bridge spanning lake when crane installed on barge dropped load of angle iron on him brought action under Jones Act against his employer and insurers. The United States District Court, Eastern District of Louisiana, George Arceneaux, Jr., J., 719 F.Supp. 516, directed verdict against worker on seaman status issue. Thereafter, the District Court granted primary protection and indemnity insurer's motion for summary judgment on excess insurer's cross claim for reimbursement of defense costs. Appeals were taken. The Court of Appeals, 917 F.2d 885, reversed and remanded. Following amendment of opinion on denial of rehearing, 923 F.2d 46, the District Court

dismissed worker's Jones Act claim, and appeals were taken. The Court of Appeals, Jerry E. Smith, Circuit Judge, held that compensation order issued by administrative law judge pursuant to Longshore and Harbor Workers' Compensation Act (LHWCA) ratifying settlement agreement of compensation claim constitutes "formal award" barring injured party from bringing Jones Act suit for same injuries.

Affirmed.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before POLITZ, Chief Judge, SMITH and BARKSDALE, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Earnest D. Sharp, an employee of Johnson Brothers Corporation ("Johnson Brothers"), was injured while performing bridge repair work and filed suit under the Jones Act, 46 U.S.C.App. § 688, and a claim under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.* He eventually reached a settlement with Johnson Brothers and its compensation insurer, the Wausau Insurance Companies (Wausau), under the LHWCA. Pursuant to the LHWCA, an administrative law judge ("ALJ") of the Department of Labor (DOL) entered an order approving the settlement and discharging Johnson Brothers and Wausau upon its payment. The district court then dismissed Sharp's Jones Act claim, holding that the election of his LHWCA remedy precluded Jones Act relief. We affirm.

I.

Sharp was a welder/pile driver for Johnson Brothers, helping to replace a railroad drawbridge over Lake Pontchartrain. He worked aboard a fleet of barges that Johnson Brothers had chartered. In November 1985, a crane dropped a load of iron on him while he worked on a tugboat in the lake, injuring his back, knee, and ankle. Johnson Brothers had obtained protection and indemnity insurance for the tug from St. Paul Fire & Marine Insurance Co. ("St. Paul"), which provided excess coverage on the barges, which also were insured by Centennial Insurance Company ("Centennial").

Johnson Brothers initiated compensation proceedings, filing a notice with the DOL, which issued a letter informing Johnson Brothers that Sharp's injury fell "within the purview" of the LHWCA and that Johnson Brothers had filed a tardy accident report. The DOL also notified Sharp that his injury "appear[ed] to fall under the jurisdiction of the [LHWCA]." Johnson Brothers then began to pay Sharp the benefits he would be due under the LHWCA.

Sharp filed a Jones Act suit in November 1986. In 1987 Johnson Brothers terminated his harbor worker benefits, and Sharp filed an LHWCA claim with the DOL. Johnson and Wausau raised the defense that Sharp was a Jones Act seaman and thus not eligible for longshore compensation.

After four continuances and a trial, the district court granted a directed verdict against Sharp on his Jones Act claim in June 1989 on the grounds that the barges were not vessels and that he was not a seaman. Sharp filed a timely notice of appeal in October 1989.

In September 1989, though, Sharp, Johnson Brothers, and Wausau settled Sharp's LHWCA claim, agreeing that Sharp would receive $225,000 and in return would release Wausau completely and would release Johnson Brothers to the extent that it was uninsured by Centennial and St. Paul. A final release was executed on October 5, 1989, and an ALJ approved the settlement pursuant to the LHWCA, 33 U.S.C. § 908(i)(1). St Paul and Centennial assert that they knew nothing of the settlement at that time.

This court heard oral argument on the appeal of the district court's directed verdict in August 1990, and, inexplicably, no one representing Sharp, Wausau, or Johnson Brothers mentioned the settlement. In November 1990, we reversed the district court on the ground that a fact question existed as to whether Sharp worked aboard a fleet of vessels and thus was a seaman *Sharp v. Johnson Bros. Corp.* 917 F.2d 885 (5th Cir.1990).

In August 1991, the district court granted summary judgment against Sharp, holding that, since as a consequence of the settlement he had elected his remedy as a harbor worker, he had no right of direct action against either of the indemnity insurers, St. Paul or Centennial, and that Johnson Brothers had violated its duty of cooperation with its insurers.[1]

II.

A.

The district court ruled that the settlement the DOL

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[1] As we conclude that the court did not err in barring Sharp's Jones Act proceeding, we do not consider the additional bases for the district court's decision.

approved constituted an election of remedies and precluded the filing of a suit based upon general maritime law or the Jones Act. It based its decision upon *Vilanova v. United States*, 851 F.2d 1, 4 (1st Cir.1988) (Wisdom, J., sitting by designation), *cert. denied*, 488 U.S. 1016, 109 S.Ct. 811, 102 L.Ed.2d 801 (1989), which states that Congress did not intend to give injured workers two chances to maximize their compensation award. The district court reasoned that the entry of an order by the ALJ constituted a finding that the injuries were compensable under the LHWCA and that by seeking, and acquiescing to, the finding, Sharp is collaterally estopped from contesting LHWCA coverage.

B.

Sharp argues that the district misunderstood what occurred. He argues that because there is a "zone of uncertainty" between the Jones Act and the LHWCA, an injured worker may pursue both remedies simultaneously. *See Simms v. Valley Line Co.*, 709 F.2d 409, 412 (5th Cir.1983). He also points to a number of commentators who argue that a worker should be able to accept benefits without losing his Jones Act claim, since the purpose of the compensation and recovery schemes is to protect the worker during his time of need. *See id.* (citing treatises). Further, there is no danger of double recovery, as one recovery is credited against the other.

Sharp further argues that collateral estoppel should not apply, because the issue of whether he was a seaman or a harbor worker was not litigated; only a consent judgment was entered in his case. According to Sharp, a consent judgment does not give rise to estoppel, as the issues underlying the judgment are neither actually litigated nor necessary and essential to the judgment. *See Hughes v. Santa Fe Int'l Corp.*, 847 F.2d 239 (5th Cir.1988) (finding no

issue preclusion). According to Sharp, the ALJ reviewed the agreement only for fairness, not jurisdiction.

Sharp calls our attention to *Southwest Marine v. Gizoni*, ____ U.S. ____, 112 S.Ct. 486, 116 L.Ed.2d 405 (1991), issued shortly before he filed his opening brief. In *Gizoni*, a rigging foreman who worked on floating platforms and sometimes did seaman's work was injured. He submitted a claim for, and received, medical and compensation benefits from Southwest Marine under the LHWCA and then sued under the Jones Act, alleging that he was a seaman injured by his employer's negligence. The district court granted summary judgment because he was not a seaman and because he was a harbor worker precluded by the exclusive remedy provisions of the LHWCA from bringing his action. The Ninth Circuit reversed, saying Gizoni's status was an issue of fact and that the LHWCA does not cover seamen, so he might be eligible for a Jones Act award. *Gizoni v. Southwest Marine*, 909 F.2d 385 (9th Cir.1990).

The Supreme Court affirmed the court of appeals, reasoning that the two statutory compensation regimes are mutually exclusive and that a maritime worker is limited to LHWCA remedies only if no genuine fact issue exists as to whether he is a Jones Act seaman. ____ U.S. ____, 112 S.Ct. at 492. The Court also stated that it found no indication in the LHWCA that Congress intended to preclude or stay traditional Jones Act suits in the district courts. *Id.* at ____, 112 S.Ct. at 493.

Most relevantly for the instant appeal, the Court stated that is is "universally accepted" that an employee who receives voluntary payments under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act, because "quite

obviously" the question of coverage has never actually been litigated. *Id.* at ____, 112 S.Ct. at 493-94. The Court observed that because the LHWCA provides that any amounts paid under the Jones Act shall be credited against any liablity imposed under the LHWCA, the LHWCA does not comprehend a preclusive effect. Finally, the court rejected an estoppel argument, since there is no threat of double recovery, stating that the estoppel argument "would force injured maritime workers to an election of remedies we do not believe Congress to have intended." *Id.* at ____ n. 5, 112 S.Ct. at 494 n. 5.

C.

Johnson Brothers, St. Paul, and Centennial distinguish *Gizoni* on the basis that the Court states that "voluntary payments under the LHWCA without a formal award" do not bar Jones Act relief but that here the filed settlement agreement of a compensation claim does constitute a "formal award." We agree.

It is beyond cavil that merely accepting voluntary payments under the LHWCA without a formal award does not bar a worker from filing a Jones Act suit. *See id.* at ____, 112 S.Ct. at 493: *see also Boatel, Inc. v. Delamore,* 379 F.2d 850 (5th Cir.1967). Here, though, Sharp obtained a settlement agreement and a compensation order issued by the ALJ. We have treated such an agreement and order as a "formal award ." *See Newkirk v. Keys Offshore,* 782 F.2d 499, 501-02 (5th Cir.1986); *see also Rodriguez v. Compass Shipping Co.,* 617 F.2d 955, 958-59 (2d Cir.1980), *aff'd,* 451 U.S. 596, 101 S.Ct. 1945, 68 L.Ed.2d 472 (1981).

Sharp argues that the settlement agreement does not dispose of the issue of coverage. In *Simms,* 709 F.2d at 412, cited in *Gizoni,* we quoted legal scholars who argued that

even the payment of benefits pursuant to a formal award in a contested proceeding might not be fatal to a Jones Act action if the compensation award was made without a proper adjudication of the claimant's status as a harbor worker. *Id.* at 412 n. 5. We never reached that issue, however, as we dismissed the petitioner's appeal as premature.

It is true that LHWCA coverage was never litigated in an adversarial proceeding. But Sharp availed himself of the statutory machinery to bargain for an award, and he had the full opportunity to argue for (or against) coverage. He filed a claim for LHWCA benefits, invoking the jurisdiction of the DOL. Pursuant to 33 U.S.C. § 908(i)(1), the ALJ considered Sharp's testimony, as well as the parties' stipulations and their settlement, before issuing its findings of fact and order extinguishing Johnson Brothers' and Wausau's liability for LHWCA benefits.

Having obtained the order of the ALJ and the aegis of the DOL to ratify and enforce his settlement, Sharp ensured that his rights were more secure under the agreement than they would have been if the settlement were considered merely a contract between the parties.[2] It follows that where the ALJ issues a compensation order ratifying a settlement agreement, a "formal award" should be deemed to have been made under *Gizoni,* and the injured party no longer may bring a Jones Act suit for the same injuries.

Our holding is consistent with the purpose of the LHWCA, as outlined in *Fontenot v. AWI, Inc.,* 923 F.2d 1127 (5th Cir.1991). The LHWCA was not designed to

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[2] In notifying the parties of the ALJ's ruling, the Deputy Commissioner of the DOL informed them that if the employer/insurance carrier failed to pay the compensation award within 10 days, it would be liable for an additional 20%.

create a mere safety net, guaranteeing workers a minimum award as they seek greater rewards in court. Rather, it has a benefit to employers, too, giving them limited and predictable liability in exchange for their giving up their ability to defend tort actions. *Id.* at 1132 (*quoting Morrison-Knudsen Constr. Co. v. Director, Office of Worker Compensation Programs,* 461 U.S. 624, 636, 103 S.Ct. 2045, 2052, 76 L.Ed.2d 194 (1983)). Permitting a Jones Act proceeding after a formal compensation award here would defeat the purpose of the LHWCA, as well as work unfairness, because, as here, employers often have different insurance carriers for workers' compensation claims and tort claims, so the compensation insurer, by guaranteeing a minimum award, necessarily would reduce the ability of the tort insurer to effect a settlement.

Nor is our holding inconsistent with *Gizoni.* In that case the Court held that an injured maritime worker did not have to choose between pursuing his potential remedies under the LHWCA and the Jones Act. There is a difference, though, between saying a plaintiff may *pursue* only one remedy and declaring that he may *receive* only one award.

We agree that Congress did not intend that a worker forfeit his right to pursue one remedy when he pursues another. Otherwise, a plaintiff might fail to receive a LHWCA award, because the ALJ considered him a seaman, but be barred from Jones Act relief because he pursued what he believed were his remedies under the LHWCA.

Nor should an employer be able to avoid Jones Act liability by voluntarily paying LHWCA benefits that a needy worker cannot but accept while awaiting trial. *See Gizoni,* ____ U.S. at ____, 112 S.Ct. at 493; *Tipton v.*

Socony Mobil Oil Co., 375 U.S. 34, 37, 84 S.Ct. 1, 3, 11 L.Ed.2d 4 (1963). But Congress did not intend that the worker be able to pick and choose his remedy based upon which has conferred upon him a larger award. That is, the LHWCA was not intended to be a "stepping stone on the way to a jury award." *Fontenot*, 923 F.2d at 1133.[3]

The judgment of the district court is AFFIRMED.

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[3] As a final note, we are distressed by the conduct of the attorneys for Sharp, Johnson Brothers, and Wausau during the previous appeal. Although we have no basis upon which to ascertain their motives, we are surprised that the parties failed to bring to our attention the fact that they had settled at least one aspect of their dispute. We recognize that counsel may legitimately have believed that the LHWCA settlement was irrelevant to the Jones Act action. Nevertheless, candor and respect for this court would dictate that the parties inform us of so significant a development in their litigation.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ERNEST D. SHARP	CIVIL ACTION
VERSUS	NO. 86-5005
JOHNSON BROTHERS CORPORATION, ET AL	SECTION "K"

MOTIONS HEARD ON JUNE 26, 1991
BEFORE THE HONORABLE
GEORGE ARCENEAUX, JR.
UNITED STATES DISTRICT JUDGE

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Proceedings recorded by mechanical stenography. Transcript produced by computer aided transcription.

PROCEEDINGS

THE COURT: Okay. Well, I'm prepared to rule, counsel. Anybody want to say anything else? Is that Mr. Sharp in court, in the courtroom?

MR. GALATAS: Yes, Your Honor.

THE COURT: Mr. Sharp, this is lawyer talk, but I want you to know, sir, that you were well-represented, and Mr. Galatas did nothing more than any good plaintiff's lawyer would have sought to do under the circumstances. The Court quarrels with maybe the ways in which he did some of it. but you have been well-represented, I think, and don't you ever think you weren't.

All right. Let's deal now with, first of all, the motion for summary judgment — two, really, motion for summary judgment and motion to conduct discovery which is filed by Centennial. And breaking that in half and dealing also with the motion for summary judgment which is filed on behalf of, interestingly enough, Johnson Brothers and St. Paul, by The St. Paul. I guess you realize now that you may have a small problem with your representation of Johnson Brothers, Mr. Maginnis.

MR. MAGINNIS: I don't think so, your Honor. We tried to overcome any potential obstacles or conflict by virtue of Mr. Knowles' representation independently and solely for St. Paul. Danny Knowles is counsel for St. Paul. We, on the other hand, represent the interests of Johnson Brothers and St. Paul through their excess P & I policy, and only within those limitations.

THE COURT: They don't have any exposure. Their exposure is all yours. Johnson Brothers has stipulated that out in Ms. Haecker-Ryan's release.

MR. MAGINNIS: That's a point we argued, your Honor. I want to point out further that we have an excess policy compared to Centennial's $1 million primary policy.

MR. GUILBEAU: I don't know if everyone has fully understood the all the ramifications of coverage. What Mr. Maginnis described, I agree with him. He still represents that interest of Johnson Brothers. Interestingly enough, Johnson Brothers still has to cooperate with him pursuant to that interest.

THE COURT: Come on. That's like saying that Saddam Hussein has got to cooperate with the Kuwaites, it's easy said.

MR. GUILBEAU: I understand your analogy, but Johnson Brothers, before settlement they cooperated with Mr. Maginnis in supplying witnesses and working with him. It was always to their detriment, and they did it anyway. Nothing has really changed. they just protected themselves.

THE COURT: They did that to their detriment when they were insured.

MR. GUILBEAU: They weren't necessarily insured, Judge. They were reserving rights. That's what Mr. Knowles is here to do. He's defending the paper, sir. Nothing has changed.

THE COURT: Mr. Guilbeau, I've heard enough from you. I'm going to grant the motions insofar as these two parties are concerned for summary judgment. One, the Court, as I have held in Pereira, and as other judges of this Court have also held, there is no direct action against either one of these parties. Secondly, I think that the settlement with the Department of Labor constitutes an election of remedies and precludes the filing of a suit on claims based on general maritime law or the Jones Act or Section 905(b). Vilanova versus the United States, I think controls, and certainly this is the thread that I find running through other Fifth Circuit opinions. But Judge Wisdom as the organ of the Court in this First Circuit case, I don't think could have put it any better than he says that it was not intended to give injured workers two chances to maximize their compensation award. And then, bearing in mind that Vilanova's settlement, the Court distinguished from his application for benefits, as was the situation here. And the Court noted that as is required by the Longshore and Harbor Workers' Compensation Act, 333 USC 908(i), which is the section relied upon by the administrative law judge in entering his order, the administrative law judge reviewed Vilanova's settlement and found it compensable under the act. Obviously the law judge believed he had jurisdiction and exercised that jurisdiction in order to confect the award.

Finally in Vilanova, "Here by seeking and then signing the settlement, Vilanova solicited and then acquiesced in the Department of Labor's finding that his injuries are compensable." And this goes even further. It refers to he

is collaterally estopped from contesting Longshoreman and Harbor Worker Act coverage. Finally — thirdly, rather. I have a hard time finding a remaining claim against the insurers. These are indemnity policies. The claims — there is no claim against Johnson Brothers. Johnson Brothers is completely relieved of liability, as I read these various settlement documents, only to the extent that Johnson Brothers might be insured. So there has got to be a time when a liability on an insured having been terminated, and the insurer's responsibility being vicarious and derivative, should be deemed to have terminated as well. And I so find here.

Finally, we talked early on this morning about the cooperation of these parties. Whether or not you produce witnesses, whether or not you provide documentary evidence, whether or not a party does other things, the cooperation clause also carries with it the obligation not to affirmatively do something which would be damaging to the defense which your insurers are undertaking, or, in the case of Centennial, which they have refused to undertake, but well might owe. The record in this case, the settlement documents, are replete with circumstances which are prejucidial to the Jones Act insurers, and the general maritime law insurers. One, there is a clear stipulation as to vessel status. Secondly, in effect there has been a $200,000 lien stipulated. thirdly, that self-serving opening statement that deals with not only a fleet of vessels, but the declaration that, had Sharp's claims been presented to a jury, more likely than not the jury would have determined the plaintiff a seaman, entitled to seaman's remedies, would be extremely damaging and hurtful to these parties on a trial.

The Court has attempted to do its best to overlook the snide references to the continuances. That snide, S-N-I-D-E, language such as none of the continuances were re-

quested by Sharp, that's true, of course, but there were at lest several caused by him or his counsel. This entire picture that's sought to be painted is one which the Court is concerned with insofar as it deals with the relationship of lawyers and the kind of honor which this Court perhaps in its old fashioned sense of propriety continues to expect from members of its bar.

The Court also notes that in these documents there is a statement — "There is a substantial reason for termination of Sharp's benefits by the employer carrier was the recognition of the merits of his claim to seaman status. Sharp has a bona fide, good faith claims to seaman status and is entitled to have a jury decide it." A statement that St. Paul and Centennial refused to negotiate an arrangement to pay weekly benefits and medicals. These are good words to include in a settlement. The Court has got no problem with them. The difficulty comes in my perception of the insured's requirement to cooperate, presenting them in such a fashion that they are going to be read to a jury perhaps under circumstances where only Johnson Brothers is a named party and are extremely damaging, indeed so much so that the Court finds that they would severly prejudice the defense.

The motion to conduct discovery filed by Centennial is granted. I think we have some problems here that I have just indicated in the coverage issues that need to be ventilated.

The motion to amend answers filed by Centennial, the Court grants. These are in the third party claims and so forth that the court thinks present facts that were not known or could have been with due diligence made known at the time the original answers were filed, and the amendment should be permitted.

The motion for leave to file amended answer by Johnson Brothers and St. Paul is likewise granted for those same reasons. The motion St. Paul for leave to file a supplemental and amended third party complaint as to the Centennial issue is likewise granted. I think all that does is formalize an issue which was presented in the original pretrial order on page 12 which dealt with specific issues between Centennial and St. Paul.

The motion for leave to amend the plaintiff's maritime complaint to add a 905(b) claim is denied. That claim is pending. There is a similar complaint in state court which was filed on November 23rd, 1988. The Court observes that certainly that was before this matter went to trial in this case, and to wait until the case has gone to the Court of Appeals, and then come back, to attempt to exert a claim that was there and actually had been exerted in the state court suit is not the kind of circumstances the Court finds would permit it, even if it wanted to, to permit it to grant the motion to amend. And I don't want to. I think it's within my discretion, and I think this case has gone on long enough. We can Ping-pong ball the case back and forth between this district and the Court of Appeal forever, if we keep adding claims as the case comes back.

Finally, I have given all the parties ample grounds for appeal. I hope, I pray, I urge parties to appeal this Court on these issues, because when you get there, I want you to be abundantly frank with the Fifth Circuit. I want the circuit to understand exactly how all of this came about, and the fact that they heard oral argument in a case which had been at least partially settled, the partial settlement presenting implications to their decision-making process, at least indirectly if not directly. But I think as a matter of common courtesy, counsel owed it to my colleagues on the Fifth Circuit Court of Appeals to tell them

about the settlement. Then it becomes their decision as to what implications, if any, that settlement may have.

Finally, I cannot, as I have said, fault counsel specifically for any actual default in their professional responsibilities. I do think as members of the bar this has been an exercise in sorry conduct. One of you clerked for this Court. I have known all of you for a number of years. I can say to you only that I am disappointed in the way you have comported yourselves. And I hope it doesn't happen again. Frankness, if it's prejudicial, is harmful, But frankness and disclosure where such things would present the other side a fair opportunity to do whatever they have to do to represent their clients has got to be demanded.

I had an old law partner who told me once, counsel, Hey, we're not selling cans of peas. There is nothing disgraceful about being a grocer. But we're not grocers. We're lawyers. The public expects more of us than what I have seen displayed in this case. But more importantly, you expect more from each other.

The Court will stand adjourned, Mr. Clerk.

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Delmer R. Simpson

Delmer R. Simpson, CSR Date

APPENDIX D

UNITED STATES DEPARTMENT OF LABOR EMPLOYMENT STANDARDS OF WORK ADMINISTRATION OFFICE OF WORKERS' COMPENSATION SEVENTH COMPENSATION DISTRICT

IN THE MATTER OF A CLAIM UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT	**AGREED SETTLEMENT PURSUANT TO SECTION 8 (i) OF THE ACT AND COMPENSATION ORDER APPROVING AGREED SETTLEMENT**
ERNEST D. SHARP Claimant/Employee	
VERSUS	**OWCP NO: 7-102714**
JOHNSON BROTHERS CORPORATION Employer	**ALJ NO: 88-LHC-1458**
AND	
EMPLOYERS INSURANCE OF WAUSAU Insurance Company	

The parties hereto, Ernest D. Sharp, employee, Johnson Brothers Corporation, Employer, and Employers Insurance of Wausau, carrier, have reached an agreement for the settlement of this claim on a lump sum basis pursuant to Section 8 (i) of the Longshore and Harbor

Workers' Compensation Act ("LHWCA"), and as a basis for said agreed settlement, the parties submit the following opening statement and stipulations:

I. OPENING STATEMENT

This claim arises out of an accident to Ernest D. Sharp on November 29, 1985 while employed by Johnson Brothers Corporation. Sharp was working at all pertinent times on a construction project involving the replacement of the draw bridge on Southern Railroad's Lake Pontchartrain's trestle. In order to perform this work, Johnson Brothers obtained a fleet of vessels consisting of one tug, one crew boat, two material barges, two spud barges and an unspecified number of small work boats. One spud barge, the JG-204, had a Manitowac crane fixed to its deck. This crane was used mainly for lifting. The other spud barge, CMS-206, had an American pile-driving crane mounted upon it. The pile-driving crew, of which Sharp was a member, worked at times on the tug, the crane barges, the material barges and the other vessels involved in the project as well as on the trestle itself. Sharp performed a substantial portion of his duties aboard the various vessels. At times, he operated the tug boat. More frequently, he directed the movement of the tug boat and spud barges.

The accident occurred on November 29, 1985. while Mr. Sharp was working at the bow of the tug boat, a load being transferred by the Manitowac crane on the JG-204 dropped upon him. As a result, Sharp suffered multiple injuries to his back, knee and ankle.

The undersigned parties concede that the various barges, the tug, the crew boat and the other small work

boats are all vessels for maritime purposes. All parties recognize that Sharp's legal status, because of his amphibious duties, cannot be easily characterized in terms of "Jones Act seaman", "maritime employee" entitled to benefits under the LHWCA, and/or a state worker. The undersigned parties contend that Sharp is the type of worker who should be allowed to have his status determined by a jury, if he so desires. The undersigned parties also recognize that had a jury determined that Sharp was not a Jones Act seaman then it would be most probable that he would be considered a maritime employee entitled to recover benefits under the LHWCA. The parties hereto acknowledge that Sharp did all within his power to have this issue determined by a jury but was denied that opportunity.

Sharp filed suit on November 13, 1986 claiming entitlement to a seaman's remedies under the Jones Act and general maritime law. That suit was filed in the United States District Court for the Eastern District of Louisiana, Civil Action No. 86-5005, Section "K" and was entitled "Ernest D. Sharp versus Johnson Brothers Corporation, et al." It was not tried until two years and seven months later on June 12, 1989. The case was continued four times. It was originally set for trial June 19, 1987. It was then continued and reset for trial on March 21, 1988. The case was subsequently continued again and reset for trial on August 15, 1988. The undersigned parties concede that these first two continuances were no doubt prompted in part by the addition as defendants of two reputed marine insurers of Johnson Brothers Corporation, Centennial Insurance Company and St. Paul Fire and Marine Insurance Company. Each of these insurers issued a Protection and Indemnity policy ("P&I" policy) which provided certain marine converages to Johnson Brothers through operation of certain of the vessels involved in the bridge trestle project.

Coverage and the nature of coverage was vigorously contested by these two P&I carriers throughout the litigtion.

Various claims were filed among the P&I carriers and Employers Insurance of Wausau. None of the continuances were requested by Ernest D. Sharp. The continuances continued. The March 21, 1988 trial date was continued and reset for August 15, 1988, which happened to fall during the week of the Republican National Convention. As the Republican National Convention approached, counsel were advised that no jury trials would be held during the week of the convention because of the virtual impossibility of the jury venire's accessing the federal courthouse on Camp Street in New Orleans. The court continued the trial from August 15, 1988 and reset it on November 14, 1988. This fourth trial setting marked the three year anniversary of Sharp's accident and two year anniversary of his filing suit. On its own motion, the court continued the trial from November 14, 1988 and reset it on June 12, 1989. Plaintiff's request for an expedited trial date before June 12, 1989. Plaintiff's request for an expedited trial date before June 12, 1989 was denied.

Meanwhile, Ernest Sharp had not received any weekly benefits since these were terminated in August of 1987. The benefits were terminated by Wausau for the reasons set forth in the LS-207 "A", Notice of Controversion of Right to Compensation, which form is attached hereto as Exhibit "A." A substantial reason for termination of Sharp's benefits by the employer/carrier was the recognition of the merits of his claim to seaman status which would preclude recovery under the LHWCA. The undersigned parties acknowledge that Sharp has a bona fide, good faith claim to seaman's status and he is entitled to have a jury decide it. Unfortunately, all attempts by the employer/carrier to negotiate an arrangement regarding

payment of appropriate weekly benefits and payment of medical expenses to or on behalf of Sharp with Johnson Brothers' others carriers, those being St. Paul and Centennial, were refused by those carriers. As a result, Sharp fell into extreme financial hardship during the period between August of 1987 and June 12, 1989, when his federal case was finally tried.

When the case was finally tried, the court did not allow the jury to determine whether Sharp was a seaman, but rather, directed a verdict dismissing his case. The undersigned parties contend that the ruling was incorrect as a matter of law and erroneous in view of the facts presented at the trial. The undersigned parties submit that had Sharp's claim been submitted to the jury, it is more likely than not that the jury would have determined that Sharp was a Jones Act seaman entitled to a seaman's remedies.

Accordingly, this application is not to be construed as an admission of liability or with respect to the ultimate determination of Sharp's status as a Jones Act seaman, maritime employee or otherwise. To the contrary, the undersigned parties specifically acknowledge that the issue of whether Sharp is a Jones Act seaman or not would be as vigorously contested at the formal hearing as it was at the federal trial.

It is understood and agreed by the parties hereto that had this case proceeded to formal hearing, the following issues would have been contested:

a. Jurisdiction.

b. Claimant's status as a maritime employee entitled to LHWCA benefits.

c. The nature and extent of claimant's disability.

d. Entitlement to any additional compensation benefits/ability to return to gainful employment.

II. *SETTLEMENT APPLICATION*

Ernest Sharp was employed by Johnson Brothers Corporation on November 29, 1985. On that date while Sharp was working on the bow of a tug boat, an overhead load of angle iron being moved by a barge-mounted crane fell upon him causing injuries to his left knee, ankle and lower back.

2. Written notice was given within 30 days of the injury.

3. Employee first received treatment at the emergency room at Slidell Memorial Hospital. His primary treating physician is Dr. Charles Krieger, an orthopaedic surgeon.

As a result of his accident of November 29, 1985, the Claimant suffered proliferative panniculitis of the left knee and chronic left quadriceps tendinitis. On January 23, 1986, Mr. Sharp underwent surgery by Dr. Charles Krieger for excision of a nodular mass from the left knee. Surgery was followed by physical therapy and periodic aspirations of synovial fluid. These conditions resolved by April 14, 1986.

As a further result of his accident, the claimant suffered a sprained ankle and posterior tibial tendinitis. The ankle sprain resolved by April 14, 1986. The tibial

tendinitis was treated by physical therapy and cast immobilization. This condition resolved by June 10, 1986.

Additionally, as a result of his accident of November 29, 1985, Mr. Sharp suffered an injury to his lower back. By clinical examination and by the use of CT-scan and myelogram, Dr. Charles Krieger diagnosed a herniated disc at L5-S1 and thereupon recommended surgery. At the request of the employer, Dr. Michael Carey of LSU Medical Center examined the claimant and reviewed the tests and agreed that surgery was necessary.

On September 29, 1986, the claimant underwent back surgery by Dr. Krieger. Surgery revealed a herniated disc at the L5-S1 space which was compressing the S1 nerve root. A radical bilateral discectomy was performed.

It is the claimant's contention that he has not yet reached maximum medical cure. He is still under the active care of Dr. Krieger, who has not released him. Second opinions have been obtained from Dr. Bernard Manale. Subsequent MRI tests have been performed as recently as March 28, 1989, and these reveal degenerative discs at L4-5 and L5-S1 with herniation at the L4-5 level.

Surgery in the future is possible, including a fusion for segmental instability. For now, the treating physicians have recommended epidural morphine injections and inpatient treatment at a pain clinic.

In August of 1987 Dr. Gernon Brown examined employee and found him fit to return to light duty work. Employee has not been released to perform any type of work by Dr. Krieger who is of the opinion that employee has a 25% permanent partial disability of the lower back. Whether employee has reached maximum medical improve-

ment with respect to his back is a contested issued between the employer/carrier and employee.

Employee is also being treated for his back problems by Dr. Bernard Manale, an orthopaedic surgeon. Dr. Manale has detected some clinical finding in Sharp's lower back, but is recommending that employee be treated with epidural injections.

4. Employee's average weekly wage at the time of injury was $654.00 per week, with a corresponding compensation rate of $436.25 per week.

5. As a result of the accident and injury, the employee was paid temporary total disability benefits from the date of the accident through August 28, 1987, a period of 91 weeks, for a total payment of $39,698.75. The employer/carrier also paid medical expenses in the amount $35,661.86. Benefits were terminated at that time based upon the opinion of Dr. Gernon Brown and the support for the employer/carrier's contention that Sharp was a seaman.

6. There is a dispute regarding whether employee has reached maximum medical cure. The employer/carrier contend that employee reached maximum medical improvement on or about August 19, 1987. Employee contends that he has not yet reached maximum medical improvement with respect to his back condition and may be in need of future treatment, including possible future surgery. Employee has not returned to any type of gainful employment since his accident.

Employee is 38 years old. He is a high school graduate. He has mechanical and welding skills which he has gained through employment as a semi-skilled manual

laborer throughout his life time.

7. The parties do not wish to pursue this matter to a formal hearing in light of the significant, well-grounded dispute over the controverted issued including: employee's status, jurisdiction, the nature and extent of any disability, and whether he is capable of returning to gainful employment.

8. The parties hereto have agreed to settle all claims in this matter for a lump sum payment of TWO HUNDRED THOUSAND AND NO/100 ($200,000.00) DOLLARS, including all claims for past and future compensation benefits, past and future medical expenses and for rehabilitation. In light of the serious factual, legal, monetary, and medical disputes involved in this matter, the proposed settlement amount is stipulated as fair, reasonable, and is acceptable and agreeable to all of the parties.

Furthermore, by way of a separate agreement among the parties hereto, Sharp will receive an additional TWENTY FIVE THOUSAND AND NO/100 ($25,000.00) DOLLARS in settlement of any non-statutory (i.e., other than compensation) claims he may have against the parties based upon maritime tort. That agreement will be the subject of a separate writing not before this tribunal, but the parties wish to advise this tribunal of the existence of this separate, binding agreement among the parties hereto.

This proposal includes the settlement of all future medical expenses. Over the course of the last year employee has incurred approximately $6,000.00 in medical expenses. Future surgery of any type is not imminent. Whether employee will undergo future surgery is a contested issued between employee and the employer/carrier.

9. Employee's counsel has waived the right to claim an attorney's fee in this matter. The total amount of $225,000.00 which is to be paid by the aforementioned separate agreement is guaranteed to employee.

10. Approval and payment of this settlement will discharge the employer and carrier of liability for the payment of any further compensation, be it for temporary or permanent, total or partial disability and for any past due or future medical expenses or any other benefits for liability under the LHWCA as a result of employee's injury of November 28, 1985.

11. Employee attests that this settlement has not been procured by the duress.

12. The parties submit this settlement application for all future compensation and medical benefits which claimant may otherwise be entitled to receive under the provisions of the Longshore and Harbors Workers' Compensation Act. The parties agree and understand that if the settlement agreement is not specifically disapproved by the Deputy Commissioner within thirty (30) days after receipt and no compensation Order of Notice of Deficiency is issued within such time, the settlement agreement shall be deemed approved and the payment thereunder shall be made pursuant to Section 914(f) of the LHWCA.

9/21/89
DATE

/s/ Ernest D. Sharp
ERNEST D. SHARP
Claimant/Employee

9/21/89
DATE

/s/ Kevin Galatas
KEVIN GALATAS
Attorney for Claimant

September 21, 1989
DATE

/s/ Joseph B. Guilbeau
JOSEPH B. GUILBEAU
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New Orleans, LA 70113
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Attorney for Johnson
Brothers Corporation and
Employers Insurance of
Wausau

ORDER OF APPROVAL

The undersigned Administrative Law Judge, pursuant to the provisions of Section 8(i) of the Longshore and Harbor Workers' Compensation Act, having considered the foregoing stipulations and agreed settlement, together with the testimony of Ernest D. Sharp, makes the following:

FINDINGS OF FACT

1. The agreed settlement is adequate and not procured by duress;

2. Settlement in the amount of TWO HUNDRED THOUSAND AND NO/100 ($200,000.00) DOLLARS set forth in the stipulation is hereby approved, and the parties are directed to carry out the requirements of the settlement;

3. The liability of the employer and carrier for all payments of compensation and medical expenses under the

Longshore and Harbor Workers' Compensation Act as a result of Ernest D. Sharp's accident and injuries of November 29, 1985 will be discharged upon payment of the agreed upon sums.

ORDER

1. It is hereby ordered that the employer and carrier shall forthwith pay all amounts in accordance with the provisions of this agreed settlement.

2. Upon payment of the amount specified above, the liability of the employer and carrier to pay compensation and medical benefits to claimant for any and all injuries sustained by claimant on or about November 29, 1985 shall be released and discharged.

GIVEN UNDER MY HAND at Metairie, Louisiana, this 21st day of September, 1989.

/s/ Richard D. Mills

RICHARD D. MILLS
ADMINISTRATIVE LAW JUDGE

PROOF OF SERVICE

I certify that on February 9, 1993, the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Seventh Compensation District and that a copy thereof was mailed on said date to the parties at the last known address of each as follows:

CLAIMANT	Ernest D. Sharp Rt. 15, Box 382 Slidell, LA 70461
CARRIER:	Employers Insurance of Wausau P. O. Box 7033 Metairie, LA 70010
CLAIMANT'S ATTORNEY:	Kevin Galatas 8654 Pontchartrain Blvd., #3 New Orleans, LA 70124
EMPLOYER/CARRIER'S ATTORNEY:	Joseph B. Guilbeau Sutherland & Juge 639 Loyola Avenue, Suite 1300 One Poydras Plaza New Orleans, LA 70113 (504) 525-2126

DONNETTE S. GLENN
DEPUTY COMMISSIONER
SEVENTH COMPENSATION DISTRICT
UNITED STATES DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION OFFICE OF WORKERS' COMPENSATION PROGRAMS

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
MAR 9 1993
OFFICE OF THE CLERK

NO. 92-1349

In the Supreme Court of the United States

OCTOBER TERM, 1992

ERNEST D. SHARP,
Petitioner

Versus

JOHNSON BROTHERS CORPORATION, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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* Counsel of Record

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QUESTION PRESENTED

The question presented raises no conflict with the established law of the United States Supreme Court or any lower court:

Whether a "formal award" was issued by the Administrative Law Judge, after pursuit by a maritime worker of Longshore and Harbor Workers' benefits, which constitutes an election of remedies by the maritime worker.

LIST OF PARTIES

The parites to the proceedings below were the petitioner, Ernest D. Sharp, and respondents, Johnson Brothers Corporation, and Centennial Insurance Companies and St. Paul Fire & Marine Insurance Company (as alleged insurers of Johnson Brothers Corporation). Wausau Insurance Company appeared as an intervenor in the proceeding below, but is not a party to these proceedings.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ERNEST D. SHARP,

Petitioner

Versus

JOHNSON BROTHERS CORPORATION, et al.,

Respondents

BRIEF IN OPPOSITION

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Respondent respectfully prays that petitioner's Application for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above and entitled proceeding on September 25, 1992, with subsequent rehearing denial on November 10, 1992, be denied.

STATEMENT OF THE CASE

In the interest of brevity, and pursuant to Supreme Court Rule 24.2, respondent clarifies the following particular facts:

On September 21, 1989, on the eve of a scheduled longshore hearing, Ernest Sharp, Johnson Brothers Corporation, and Wausau Insurance Company obtained a "formal award" and settlement funds whereby Ernest Sharp received $200,000.00 in settlement of his claims presented under the Longshore and Harbor Workers' Compensation Act. Respondents, Johnson Brothers Corporation and St. Paul Fire & Marine Insurance Company, in their capacity as defendants to the Jones Act and general maritime law claims of Ernest Sharp in the lower court, were unaware of these proceedings and settlement.

The "formal award" or formal order of approval and findings of facts was signed by Administrative Law Judge Richard Mills. Contrary to Appendix 34 of Petitioner's Appendix, the Compensation Order was filed in the Office of Deputy Commissioner, 7th Compensation District on October 5, 1989, shortly after execution by Administrative Law Judge Richard Mills. Appendix 34 of Petitioner's Appendix states "February 9, 1993." This date is incorrect.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's finding that petitioner, Ernest Sharp, obtained a "formal award" and "elected his remedy" is neither contrary nor inconsistent with prior holdings of the United States Supreme Court and lower courts. A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit is unnecessary in the absence of a conflict between existing law and the holding at issue.

Thus, there is an absence of conflict between existing law. Further suggesting that the Fifth Circuit opinion is correct, and that there is no conflict to be reviewed, respondent now prays that petitioner's Applicatioin for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

REASONS WHY WRIT SHOULD BE DENIED

ERNEST SHARP'S FORMAL AWARD AND SETTLEMENT PURSUANT TO 33 U.S.C. §908(i) CONSTITUTES AN ELECTION OF REMEDIES AND PRECLUDES HIS CLAIMS AS A JONES ACT SEAMAN

A. Petitioner, Ernest Sharp, Completed his Pursuit and Elected an Exclusive Remedy

The Jones Act (46 U.S.C.A. §688) and the Longshore and Harbor Workers' Compensation Act ("LHWCA") each provide a **remedy** to an injured maritime worker. *Southwest Marine, Inc. v. Gizoni*, ____ U.S. ____, 112 S.Ct. 486 at 491, 116 L.Ed.2d 405 (1991). *Gizoni* supports and continues with the axiom that "The Jones Act and the LHWCA are mutually exclusive." 112 S.Ct. at 492.

Petitioner's argument is flawed in its discussion of "consent judgments" and the application in this case of *res judicata* principles. This matter involves an "election of remedies" preclusion, not *res judicata*. The doctrine of election of remedies and *res judicata* are **distinct**. 25 Am. Jur.2d, Election of Remedies, Section 1(b) (1941).

The doctrine of election of remedies prevails in maritime cases. The doctrine presupposes a plurality of alternative rights or remedies, and rests upon the principle that he who seeks equity must do equity. *Smith v. Lykes Brothers-Ripley S.S. Co.*, 105 F.2d 604, *cert. denied*, 60 S.Ct. 144, 308 U.S. 604, 84 L.Ed. 505. An election of remedies is a choosing between two or more different and co-existing modes of procedure and relief. 25 Am. Jur.2d, Election of Remedies, Section 1 (1966).

It is axiomatic that the Jones Act and LHWCA provide mutually exclusive remedies. When a maritime worker goes beyond the "pursuit" of one remedy and "receives" an award of one, such a worker has elected his remedy. *Gizoni* recognizes that the Jones Act and LHWCA provide remedies, and "voluntary payments under the LHWCA without a formal award" does not bar seeking relief under the Jones Act. But, as noted by the Fifth Circuit, *Gizoni* is consistent yet distinguishable because petitioner Ernest Sharp went beyond the "pursuit" of his LHWCA remedy, and obtained an LHWCA "formal award."

Simply stated, Congress did not intend that the worker be able to pick and choose his remedy based upon which has actually conferred upon him a larger award. The LHWCA was not intended to be a "stepping stone on the way to a jury award." *Fontenot v. AWI, Inc.*, 923 F.2d 1127 (5th Cir. 1991).

B. A "Formal Award" was Issued — The Pursuit is Over

It is well established that a settlement agreement of a compensation claim filed by a longshoreman under the Longshore and Harbor Workers' Compensation Act does amount legally to a "formal award" (even if it is executed by only a deputy commissioner.) *Rodriguez v. Compass Shipping Co., Ltd.*, 617 F.2d 955 (2d Cir. 1980), *aff'd*, 451 U.S. 596, 101 S.Ct. 1945, 68 L.Ed.2d 472 (1981). In *Newkirk v. Keyes Offshore, Inc.*, 782 F.2d 499 (5th Cir. 1986), the Fifth Circuit found that a "compensation order entered upon settlement of the employee's claims and against the employer is a 'formal compensation order.' "

There is no dispute that merely accepting voluntary payments under the LHWCA without a formal award does

not bar a worker from filing a Jones Act suit. But, where an Administrative Law Judge issues a compensation order ratifying the settlement agreement, a formal award is issued. The injured party should no longer be able to bring a Jones Act suit for the same injuries. There is a difference between holding that a plaintiff may pursue only one remedy and declaring that he may receive only one award.

Finally, the cases of *Vilanova v. U.S.*, 851 F.2d 1 (1st Cir. 1988) and *Fontenot* show no conflict between circuits and the U.S. Supreme Court. Both support and extend the theory of election of remedies.

It is noted in *Vilanova*:

> "As is required by the LHWCA, 33 U.S.C. §908(i), the Deputy Commissioner of Labor for the LHWCA compensation reviewed Vilanova's settlement, and, finding that Vilanova's injuries were compensable under the LHWCA, approved it."
>
> "Because it has been determined that Vilanova's injuries are covered by the LHWCA, LHWCA compensation is Vilanova's exclusive remedy against the United States."

As in *Vilanova*, *Fontenot* held that "a finding of LHWCA coverage sought and obtained by the injured worker from the department should preclude any subsequent action against his employer for the same injury." *Id.* at 1133. The LHWCA is not a simple remedial statute intended for the benefit of workers. Rather, the LHWCA is designed to strike a balance between the concerns of the longshore and harbor workers on the one hand, and the employers on the other hand. Essentially, the employer and employee gave up the right to a trial which could be slow,

expensive and uncertain, in exchange for hopefully a quicker, less expensive, more certain administrative system. Judge Wisdom noted:

> "... In enacting the LHWCA, Congress intended that it be the sole exclusive remedy for workers within its scope, not a stepping stone on the way to a jury award." *Id.* at 1133.

Each and every decision by the lower circuit courts is consistent with *Gizoni*. *Gizoni* merely states that an employee who receives **voluntary payments** under the LHWCA without a formal award is not barred from subsequently seeking relief under the Jones Act. However, once there is a formal award, the claimant has elected his remedy and is precluded from pursuing any other.

Administrative Law Judges have exclusive jurisdiction under the LHWCA regarding the approval of settlement of claims. Approval under Section 8(i) is the only way to discharge the liability of the employer and the carrier under the LHWCA. In the instant situation, Administrative Law Judge Richard Mills issued specific findings maintaining jurisdiction and entered an order approving the settlement. This was done in accordance with the express jurisdiction provisions of the LHWCA, and the Code of Federal Regulations. The settlement was formally approved and constituted an affirmative, binding election of a remedy which barred petitioner's Jones Act claim.

Petitioner, Ernest Sharp, relies on cases that involve the mere acceptance of LHWCA compensation benefits. An 8(i) application is not the equivalent of "mere acceptance for compensation benefits." Rather, an 8(i) application is the formal procedure before the Department of Labor which has exclusive jurisdiction to approve all settlements between the employer and the employee.

CONCLUSION

The Fifth Circuit's opinion is not in conflict with any current holdings of the Fifth Circuit, nor in any other circuit. Additionally, the Fifth Circuit opinion is consistent with *Gizoni*. Petitioner, Ernest Sharp, went beyond the pursuit of voluntary payments.

A maritime worker does not have to choose between pursuing his potential remedies under the LHWCA and the Jones Act. But, when he chooses a remedy by receiving an LHWCA award, he has elected an exclusive remedy. He is barred at that point from Jones Act relief.

Supreme Court, U.S.
FILED
APR 7 1993
OFFICE OF THE CLERK

NO. 92-1349

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ERNEST D. SHARP
Petitioner

versus

JOHNSON BROTHERS CORPORATION, et al.,
Respondents

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. The questions presented fail to merit review.

II. Sharp and Wausau's case is moot because of the signed releases, the settlement approval and election of remedies and because the Jones Act and LHWCA are mutually exclusive statutes.

III. The statutory mechanism for approval of LHWCA settlements, and findings made pursuant thereto, are binding on Sharp and Wausau. The Department of Labor's order and findings are not merely a consent judgment.

IV. The lack of candor in failing to disclose settlement violated fair play requirements and unduly continued terminated litigation.

LIST OF PARTIES

Centennial objects to the Sharps' list of parties. The Sharps have settled and have assigned their claim, if any, to Employers Insurance Company of Wausau, who is the real party in interest in these proceedings and not just an intervenor.

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STATEMENT OF THE CASE

Ernest Sharp, claiming to be a seaman, sued his employer, Johnson Brothers Corporation ("Johnson Bros.") under the Jones Act, and the general maritime law. Sharp, a shore-based welder, was temporarily working on a bridge repair project in Lake Pontchartrain. Sharp previously reported his claim to the Department of Labor and received from Employers of Wausau (Wausau) full compensation and all medical benefits for several years under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). The Department of Labor determined that Sharp's claim fell within the jurisdiction of the LHWCA. (Appendix at A-2). Sharp was pronounced able to return to work and was offered continuation of his employment as a welder by Johnson Bros., but he turned down the job choosing rather to pursue his Jones Act claim in court.

St. Paul Fire & Marine Insurance Company ("St. Paul"), the primary P&I insurer of Johnson Bros. on the tug FERDIE CANDIES, undertook without reservation the defense of Johnson Bros. for the Jones Act and general maritime law claims, and later filed a third party complaint against Centennial Insurance Company ("Centennial"), a P&I insurer of a dumb unmanned barge on the bridge construction project that had been chartered to Johnson Brothers.[1] All defendants contested Sharp's claim that he was a seaman. It was not disputed that Wausau was the

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[1] Sharp subsequently amended his suit to sue Centennial, St. Paul and Wausau under the Louisiana Direct Action statute, La.R.S. 22:658, which (at that time) allowed a tort claim to be asserted directly against a party's insurance carrier, but later the law was interpreted to not permit this type of suit.

insurer of Johnson Bros. for all compensation and medical payments made under the LHWCA and Wausau also provided Jones Act coverage for Sharp's claims against Johnson Brothers. (Appendix A-19-26).

Sharp's Jones Act claim was tried in the district court. After several days of testimony on the question of seaman status, the district judge entered a directed verdict rejecting Sharp's claim to seaman status. Sharp v. Johnson Bros. Corp., 719 F.Supp. 516 (E.D. La. 1989). The decision was based upon a finding that there was absolutely no evidence to support Sharp's claim for seaman status.[2] Judgment was rendered on June 15, 1989 and entered on October 17, 1989.

Next, Sharp then filed a motion to set for hearing his compensation claim against Johnson Brothers and Wausau under LHWCA and the case was set for hearing before an ALJ in September 1989. Immediately prior to the hearing, the parties then voluntarily settled all of the LHWCA and Jones Act claims for a cash payment totaling $225,000.00. This cash settlement was known only to Sharp, Johnson Brothers and Wausau and their attorneys. The settlement approved by the Administrative Law Judge was based upon his finding of jurisdiction over the claim and a formal order of approval and findings were entered, as is required by § 908 (i) of the LHWCA and the Code of Federal Regulations. (Petitioner's Appendix at A-32). In addition to that LHWCA settlement on October 5, 1989, the Sharps also entered into a side or secret "Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement" under which the SHARPS received an additional $25,000.00 in cash (making for the total

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[2] The District Court further found that Sharp, a shore-based welder/pile driver, was not permanently assigned to a vessel or identifiable fleet of vessels and that the barges on the work site were stationary work platforms, and not "vessels" for purpose of the seaman's claim.

payment of $225,000.00) pursuant to the insurance coverage which Wausau had issued to Johnson Bros. The secret $25,000.00 settlement agreement was withheld from the Record before the Department of Labor and was also withheld from this Court by Petitioners. Centennial produces herewith a copy of this Agreement at Appendix A-7.

In this agreement the Sharps received $25,000.00 to release both the Jones Act and maritime claims. Under the secret disbursement and payout provision, if the Sharps recovered money under any theory from Centennial or St. Paul including a claim under 905 (b) of the LHWCA, Sharp's attorney would receive a contingency fee of 40% plus $15,000.00 in expenses. Interestingly enough, Sharp's attorney recited to the Department of Labor in the 8 (i) application that he waived his contingency fee. The Sharp's further agreed the first $225,000.00 recovered would be paid directly back to Wausau and acknowledged that if the proceeds were insufficient to pay the first $225,000.00, the entire amount of the remaining proceeds would be paid directly to Wausau. Cleverly Wausau orchestrates this appeal in Sharp's name whereas in fact Wausau is not "just an intervenor" but Wausau is the real party at interest in this appeal and has been since the settlement and Sharp's statements to the contrary in their brief are not true.

After the settlement was made the first appeal was then filed by Sharp with the Fifth Circuit but no mention was ever made to that court that Sharp had already settled his claims. The settlement was intentionally withheld and kept secret by Sharp, Johnson Bros. and Wausau and their counsel. This tactic and breach of the ethical duty of candor was noted in the second

appeal to that court.[3] Sharp and Wausau then continued to perpetrate their charade by staging an argument before the Fifth Circuit, in an already mooted case, and representing that there was a bona fide dispute as to whether Sharp was a Jones Act seaman. The Fifth Circuit, unaware that the case had been settled and an election of LHWCA coverage made, issued an opinion vacating the district court's granting of a directed verdict and remanding the case back to be submitted to a jury on the seaman status issue. Sharp v. Wausau Ins. Companies, 917 F.2d 885 (5th Cir. 1990).[4]

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[3] The Circuit Court noted:

> As a final note, we are distressed by the conduct of the attorneys for Sharp, Johnson Brothers, and Wausau during the previous appeal. Although we have no basis upon which to ascertain their motives, we are surprised that the parties failed to bring to our attention the fact that they had settled at least one aspect of their dispute. We recognize that counsel may legitimately have believed that the LHWCA settlement was irrelevant to the Jones Act action. Nevertheless, candor and respect for this court would dictate that the parties inform us of so significant a development in their litigation.

Sharp v. Johnson Bros., 973 F.2d 423, 427 n.3 (5th Cir. 1992).

[4] This opinion is not reproduced herein. Respondent submits that this opinion was moot since the time of Sharp's settlement. This Court has expressed its very serious concern over the failure of counsel to disclose to the Court "any development" which conceivably affects the outcome of the case. See Fusari v. Steinberg, 419 U.S. 379, 391 (1975). See also Piambino v. Bailey, 757 F.2d 1112 (11th Cir. 1985), cert. denied, 476 U.S. 1169 (1986), and In re: Universal Minerals, Inc., 755 F.2d 309, 312-13 (3d Cir. 1985).

Following remand to the district court, it was then for the first time discovered by Centennial at a status conference that Sharp and Wausau had settled all claims. These settlement and release papers are still conspicuously absent from Petitioner's Appendix and WE MUST AGAIN QUESTION WHY THAT HAS OCCURRED HERE IN THIS COURT. These papers are produced herein at Appendix A-7. Hence, Petitioner Sharp is no longer the real party in interest — it is Wausau, but Wausau has not requested certiorari. Sharp's Petition for Certiorari is obviously moot because he has settled his case against his employer.

After discovery of the settlement, Centennial moved for summary judgment. The District Court held, and the Appeals Court affirmed, that Sharp's voluntarily election of settlement in accordance with 33 U.S.C. § 908 (i) constituted a binding election of remedies barring the Jones Act suit. Sharp v. Johnson Bros., 973 F.2d 423 (5th Cir. 1992). The Fifth Circuit agreed that the Department of Labor approved the settlement when it precluded further litigation based upon previous decisions of the Appellate Courts. See, e.g., Vilanova v. United States, 851 F.2d 1, 4 (1st Cir. 1988), cert. denied, 488 U.S. 1016 (1989).

Certiorari here is sought on grounds that the Fifth Circuit declined to follow this Court's decision in Southwest Marine, Inc. v. Gizoni, 112 S.Ct. 486 (1991), and Sharp (Wausau) attempts to characterize the binding settlement approved by the Administrative Law Judge as merely a "consent judgment." As explained below, this argument lacks merit and the Petition should be denied. The lower courts followed the precedents of this Court and the Sharps were paid money and have made an affirmative election of remedies and have also settled the LHWCA, Jones Act and general maritime law claims. NOTHING MORE REMAINS HERE TO BE LITIGATED.

ARGUMENT

I. THE QUESTIONS PRESENTED FAIL TO MERIT REVIEW.

The questions raised by Sharp-Wausau do not merit review nor do they articulate any "special and important reasons" required by Rule 10 of the Supreme Court of the United States to support the argument that this Court should exercise its discretionary power of review. Rule 10 indicates that there must be a substantial federal question presented to warrant the granting of certiorari. The questions presented here relate solely to factual issues, and do not present substantial issues of law as required by Rule 10. The Fifth Circuit's decision is not in conflict with a decision of this Court or of another Federal Appellate Court, nor has the Fifth Circuit decided a federal question in a way which conflicts with a state court of last resort. There simply is no evidence that the Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court" as to warrant an exercise of this Court's power of supervision. Rather, as shown below, the decision below is in full accord with the LHWCA, the Jones Act, and the precedents of this Court.

Certiorari should not be granted "except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties," and where "there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 79 (1955) (quoting Layne & Bowler Corp v. Western Well Works, Inc., 261 U.S. 387, 393 (1923)). No such reasons exist in this case. Wausau is merely cleverly seeking under its assignment to recover what it was required to pay the Sharps below and is attempting to re-argue the case which Sharp lost. This Court has stressed that it

does not "sit for the benefit of particular litigants." Rice, 349 U.S. at 74. It is therefore submitted that this Court should not exercise its discretionary power of review merely for Wausau benefit and the request for certiorari should be denied.

II. SHARP AND WAUSAU'S CASE IS MOOT BECAUSE OF THE SIGNED RELEASES, THE SETTLEMENT APPROVAL AND ELECTION OF REMEDIES AND BECAUSE THE JONES ACT AND LHWCA ARE MUTUALLY EXCLUSIVE STATUTES.

It is well established that the Jones Act and the LHWCA are mutually exclusive statutory regimes and that the LHWCA expressly excludes from its coverage "a master of member of a crew of any vessel." McDermott International, Inc. v. Wilander, 498 U.S. 337, 111 S.Ct. 807 (1991); Southwest Marine, Inc. v. Gizoni, 112 S.Ct. 486, 491 (1991). Sharp and Wausau elected on the eve of the administrative hearing to be covered by the LHWCA and they both sought the Department of Labor's approval that the claim was covered by the LHWCA. (Appendix at A-2).

Many self-serving clauses are included in the settlement documents but the Administrative Law Judge could only approve the settlement if the claim fell under the jurisdiction of the LHWCA. It is significant to note that no one raised that the settlement was ineffective because Department of Labor lacked jurisdiction. Sharp and Wassau merely contend that he did not intend the settlement to bar a Jones Act claim, but the settlement papers have already been correctly interpreted by the lower courts to the contrary.

The trial judge noted that Sharp, similar to the claimant in Vilanova had acted:

> Secondly, I think that the settlement with the Department of Labor constitutes an election of remedies and precludes the filing of a suit on claims based on general maritime law or the Jones Act or Section 905(b). ... Obviously the law judge believed he had jurisdiction and exercised that jurisdiction in order to confect the award.
>
> Finally, in Vilanova, "Here by seeking and then signing the settlement, Vilanova solicited and then acquiesced in the Department of Labor's finding that his injuries are compensable." And this goes even further. It refers to he is collaterally estopped from contesting Longshoreman and Harbor Worker Act coverage. Finally — thirdly, rather. I have a hard time finding a remaining claim against the insurers. These are indemnity policies. The claims — there is no claim against Johnson Brothers. Johnson Brothers is completely relieved of liability, as I read these various settlement documents, only to the extent that Johnson Brothers might be insured. So there has got to be a time when a liability on an insured having been terminated, and the insurer's responsibility being vicarious and derivative, should be deemed to have terminated as well. And I so find here... .
>
> The record in this case, the settlement documents, are replete with circumstances which

> are prejudicial to the Jones Act insurers, and the general maritime law insurers. One, there is a clear stipulation as to vessel status. Secondly, in effect there has been a $200,000 lien stipulated. thirdly, (sic) that self-serving opening statement that deals with not only a fleet of vessels, but the declaration that, had Sharp's claims been presented to a jury, more likely than not the jury would have determined the plaintiff a seaman, entitled to seaman's remedies, would be extremely damaging and hurtful to these parties on a trial.

(Petitioner's Appendix A-17-18).

In Gizoni, this Court reiterated the long standing rule that the "mere acceptance" of LHWCA benefits pending trial of a Jones Act suit does not in it of itself constitute an election of remedies or bar a claimant from pursuing a Jones Act claim. Here, the Fifth Circuit followed and recognized this rule specifically finding that Sharp went beyond "mere acceptance" of benefits and had affirmatively entered into a binding settlement. 973 F.2d at 426. Sharp and Wausau ignore this direct, uncontradicted finding in an attempt to pose a question for this Court to review. They also ignore that several hearings were scheduled with the Department of Labor to resolve Sharp's claim for LHWCA benefits. On the eve of a formal hearing before an Administrative Law Judge, Sharp, Johnson Bros. and Wausau voluntarily entered into a binding settlement, which was later approved by the ALJ. Sharp's consideration was $200,000.00 in addition to the $68,000.00 in compensation and medical benefits previously paid and a "side" $25,000 paid to them. The district court and the Fifth Circuit correctly ruled after reviewing the statutory requirements of the LHWCA and jurisprudence that the LHWCA settlement and signed Releases under §908 (i) bars a

later Jones Act suit and constitutes an affirmative election of remedies, and was therefore distinguishable from the mere acceptance of LHWCA benefits. See Sharp v. Johnson Bros., 973 F.2d 423, 426 (5th Cir. 1992).

III. THE STATUTORY MECHANISM FOR APPROVAL OF LHWCA SETTLEMENTS AND FINDINGS MADE PURSUANT THERETO, ARE BINDING ON SHARP AND WAUSAU. THE DEPARTMENT OF LABOR'S ORDER AND FINDINGS ARE NOT MERELY A CONSENT JUDGMENT.

A review of the LHWCA's statutory history shows that the lower courts' interpretation of the settlement was correct. Under § 905 (8) (a) of the LHWCA Congress provided that compensation and medical benefits are the exclusive remedies of an employee against his employer for injuries coveredby the Act. Gizoni, 112 S.Ct. at 491; Moore v. Phillips Petroleum Company, 912 F.2d 789, 791 (5th Cir. 1990). This Court considered the purpose and scope of the LHWCA in South Chicago Coal and Dock v. Bassett, 309 U.S. 251 (1940), and noted:

> Its general scheme was to provide compensation to employees engaged in maritime employment, except as stated, for disability or death resulting from injuries occurring upon navigable waters of the United States where recovery through workmen's compensation proceedings might not validly be provided by state law.
>
> * * *
>
> For those employees who are entitled to compensation, the remedy under the Act is exclu-

> sive. Section 5 [33 U.S.C. §905] This made inapplicable for such employees the provision of § 33 of the Merchant Marine Act (called the Jones Act) which carried to "seamen" at their election the benefit of the provisions of the Federal Employers' Liability Act. The Bill, which became the Longshoremen's & Harbor Workers' Compensation Act, was at one stage amended so as to include a master and members of a crew of a vessel owned by a citizen of the United States. They preferred, however, to remain outside the compensation provisions and thus to retain the advantages of their election under the Jones Act, and the Bill was changed accordingly so as to exempt "seamen." Then, in its final passage, "a master or member of a crew" were substituted for "seamen."

309 U.S. at 256, 60 S.Ct. at 547 (emphasis added).

In Wilander, 111 S.Ct. 807, the Court approved of Bassett and noted:

> We have said that seamen status under the Jones Act is a question of fact for the jury. In Bassett, a LHWCA case, the Court held that Congress had given to the Deputy Commissioner, an administrative officer, the authority to determine who is a "member of a crew" under the LHWCA. 309 U.S. at 257-258, 60 S.Ct. at 547-48. If there is evidence to support the Deputy Commissioner's finding, it is conclusive.

111 S.Ct. at 818.

As the Fifth Circuit found and noted, Sharp and Wausau could have litigated whether he was covered under the LHWCA or by the Jones Act, but instead on the eve of trial they voluntarily decided to enter into a lump sum binding settlement, which settlement was approved by the Department of Labor. Sharp, 973 F.2d at 426. Sharp received the $225,000.00 cash settlement (in addition to compensation and medical expenses previously paid) after the U.S. District Court had dismissed his Jones Act suit and found his evidence lacking that he was a seaman. However, here they continue to ignore the decision of the First Circuit in Vilanova v. United States, 851 F.2d 1 (1st Cir. 1988), cert denied, 488 U.S. 1016 (1989). Vilanova recognized that an employee makes an affirmative election of remedies by entering into a settlement approved by the Department of Labor. As in the Vilanova case, Sharp's claim was found by the Department of Labor to fall within the jurisdiction of the LHWCA. This finding was initially made when the claim was submitted and is totally ignored by Sharp. (Appendix at A-2). The Vilanova court noted that the settlement approved by the Department of Labor has an entirely different effect from a mere application for LHWCA benefits. 851 F.2d at 5. The Vilanova court noted that the U. S. Department of Labor "has special expertise in evaluating work place injuries and more efficient procedures for doing so than the court ...." Id. The entire administrative process for the LHWCA that has been established by Congress is designed to produce "quicker and better decision and promotes national uniformity more than would coverage decisions made by the courts." Id. Sharp, like Vilanova, did not contest LHWCA coverage before the Department of Labor when he had the opportunity to do so. In recognizing that the settlement entered into before the Department of Labor was valid and binding, barring a subsequent suit, the Vilanova court noted:

> Here, Vilanova did not contest LHWCA coverage before the Department of Labor when

> he had the opportunity to do so. Although an injured employee may collaterally attack a Department of Labor finding that his injuries are compensable under the NFIA or LHWCA, we hold that he may not do so when fails to contest coverage in a decision by the Department of Labor. Here, by seeking and then signing the settlement, Vilanova solicited and then acquiesced in the Department of Labor finding that his injuries are compensable. He is, therefore, collaterally estopped from contesting LHWCA coverage.

851 F.2d at 6 (footnotes omitted). As with Vilanova, Petitioner did not contest the LHWCA's initial determination that his claim was covered by the LHWCA. Here Sharp and Wausau went one step further, they also settled the Jones Act claim by a "secret" settlement withheld from both the courts and even the Administrative Law Judge. Therefore, under this settlement the Jones Act claim is barred. Sharp was amply paid for his injuries- and he and Wausau cannot have the best of both worlds.

IV. LACK OF CANDOR IN FAILING TO DISCLOSE SETTLEMENT VIOLATES JUDICIAL FAIR PLAY REQUIREMENTS AND UNDULY CONTINUED TERMINATED LITIGATION.

Both the Sharps and Wausau had a duty to reveal their "real" positions in the case once they settled and before they filed their Notice of Appeal in the first case.

> "The handling of a lawsuit and its progress is not a game. There is an absolute duty of candor and fairness on the part of counsel to both the Court and opposing counsel."

Virzi v. Grand Trunk Warehouse and Cold Storage Co., 571 F.Supp. 507, 512 (E.D.Mich. 1983).

> "Above and beyond the dictates of courtesy counsel have a 'continuing duty to inform the Court of any development which may conceivably affect an outcome' of the litigation. Fusari v. Steinberg, 419 U.S. 379, 391, 95 S.Ct. 533, 540, 42 L.Ed.2d 521 (1975) (Burger, C.J., concurring)."

In Re Universal Minerals, Inc., 755 F.2d 309, 312-13. (3d Cir. 1985).

This Court has noted:

> "[t]his Court must rely on counsel to present issues fully and fairly and counsel have a continuing duty to inform the Court of any development which may conceivably affect an outcome."

Fusari v. Steinberg, 419 U.S. 379, 391 (1975).

In Fusari, this Court was not advised that the Connecticut Legislature had significantly changed its unemployment compensation system. The new statute was not mentioned in the Briefs or mentioned to the Court at oral argument. Chief Justice Burger issued a concurring opinion where he agreed with the majority of the Court that the failure of counsel to disclose this development was "difficult to understand" when "even at oral argument, we were not informed of the changes in state law although both parties filed their briefs after the new statute was passed. ... All parties had an obligation to inform the Court that the system in which the District Court had enjoined had been changed ...." 419 U.S. at 490 (emphasis added).

In Piambino v. Bailey, 757 F.2d 1112 (11th Cir. 1985), cert. denied sub nom, 476 U.S. 1169 (1986), neither the lead counsel nor attorneys for any other party advised the court of the dismissal of another claim involving the same defendant. Id. at 1131. The Court noted that lead counsel's failure to apprise the District Court of the dismissal, on the merits, of the virtually identical claims and the appeal court's later dismissal of the appeal, would appear to subject lead counsel to disciplinary proceedings. Id. at 1131 n.44.

The candor rules demanded that Sharp, Wausau or Johnson Bros. disclose to all Courts the fact that the case had been settled prior to their first Notice of Appeal to the Fifth Circuit. Sharp and Wausau filed two Appeals and Briefs in the Fifth Circuit and represented that there was existing a dispute when in truth and fact there was none. The two settlements removed the central issue (Sharp's seaman status) from the case or at the very least certainly constituted a new development which all Courts and other litigants, particularly Centennial, should have been informed. This is especially true since the Centennial policy does not cover claims under the LHWCA and Johnson Bros. would have no claim against Centennial for reimbursement for the longshore settlement. The record below reflects statements of counsel for Sharp (Mr. Galatas) and counsel for Wausau (Mr. Guilbeau) before the District Court at the hearing:

> THE COURT: And you don't feel you had an obligation to tell the Fifth Circuit about it?
>
> MR. GALATAS: I don't think I had an obligation to tell the Fifth Circuit.
>
> ***

THE COURT: Did not tell the Fifth Circuit?

MR. GUILBEAU: I didn't tell the Fifth Circuit. I didn't think there was an affirmative duty to tell them.

THE COURT: Didn't want them to know about it as a matter of fact?

MR. GUILBEAU: I didn't think it would make any difference. The issue wasn't there. I thought they at that time, you know, it as not a complete settlement. There was not going to be a joint motion to dismiss the case.

THE COURT: Don't think it would have raised perhaps an opportunity for them to pass upon it, whether or not there was an election of remedies?

MR. GUILBEAU: I felt certain they would kick it back. It's not before them. It's not briefed. We're going forward.

THE COURT: And since the trial in the District Court, don't you think they might have wanted some briefing on it? They could have disposed of that issue and saved themselves some time? Of course, if they disposed of it the wrong way, you would have a problem. (Italics added)

MR. GUILBEAU: I don't think it was an affirmative duty. I don't think there was any merit to the argument that the settlement of a longshore

> case, where you specifically reserve the issue of status, would preclude a later or subsequent or ongoing —

(Transcript pp.21, 24-25) (emphasis added).

In Leger v. Drilling Well Control, Inc., 69 F.R.D. 358, aff'd, 592 F.2d 1246 (5th Cir. 1979), the court noted:

> Our holding: An omnipresent characteristic of modern maritime litigation is its mutiparty nature. When one co-defendant settles with the plaintiff and the settlement agreement provides that it is to receive 50% of any judgment recovered from the remaining defendant, then and in that case such an agreement must be revealed prior to trial, so that a full and fair evaluation may be made by counsel and jury.

69 F.R.D. at 361 (emphasis added).

Judge Rubin, sitting on the district bench, when confronted by a secret settlement stated as follows:

> "While lawyers owe a duty to their clients, they owe a primary duty to the administration of justice. They profess to be, and they are, officers of the court."

Daniel v. Penrod Drilling Co., 393 F.Supp. 1056, 1059 (E.D. La. 1975).

Here, as the District Court noted, what has ensued in this litigation is a very sad and sorry example of what the practice of law can deteriorate into when litigants do not exhibit candor with

the Court and attempt to orchestrate litigation in secrecy. The District Judge said it aptly at the conclusion of the hearing in this matter:

> We're lawyers. The public expects more of us than what I have seen displayed in this case. But more importantly, you expect more from each other.

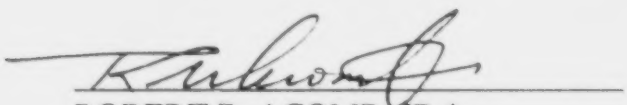
(Petitioner's Appendix at A-21).

Johnson Brothers and Wausau owed a duty to Sharp when he was injured. They sought to shift the duty to another's insurers, namely St. Paul, the insurer of a dumb barge. Once Sharp lost in his trial of the Jones Act case they quickly settled all claims with him even under the Jones Act and General Maritime Law (the secret Release) but then proceeded with an appeal in SHARP's name without disclosing that Wausau would receive the first money back from a settlement or trial. This type of action, if permitted, would result in litigation becoming never ending and the first person to settle would always seek to continue the suit as a way of reducing its loss. All parties were entitled to know of the settlement and perhaps the case would have ended in the first appeal to the Fifth Circuit, not the second appeal. Johnson Brothers and Wausau should not be permitted to profit from their conniving tactics here.

CONCLUSION

Petitioner's request for certiorari should be denied because the questions presented do not merit review. Petitioner's claim has been settled and, having made an affirmative election of remedies and foregoing the right to contest the Department of Labor's finding that Petitioner's claim fell within the jurisdiction of the LHWCA, Petitioner is estopped from claiming recovery under the Jones Act, as the Fifth Circuit so found. The questions presented by Petitioner do not involve important questions of federal law nor has Petitioner demonstrated a conflict among the circuits or disregard of any precedent of this Honorable Court. The Sharps and his employer Johnson Brothers and its insurer Wausau voluntarily settled all claims in this matter, voluntarily signed two separate releases which covered LHWCA claims and Jones Act and Maritime Law claims, then obtained an 8(i) approval of the LHWCA settlement and there the case must end. The factual findings and legal conclusions of the lower courts are clearly supported by the record and are consistent with this Court's pronunciations and the purpose and intent of the Longshore and Harbor Workers' Compensation Act. Therefore, the request for certiorari should be denied.

Respectfully Submitted,



ROBERT B. ACOMB, JR.*
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201 St. Charles Avenue
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504/582-8000
Attorneys for Counsel for Respondent,
Centennial Insurance Company

***Counsel of Record**

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served upon counsel for all parties by placing same into the United States Mail or Hand Delivery on this the 7th day of April, 1993.

ROBERT B. ACOMB, JR.

APPENDIX A

APPENDIX:

Listing of Parent and Subsidiary Companies
in Accordance with Supreme Court Rule 29.1:
Atlantic Mutual Insurance Companies

U.S. Department of Labor

Employment Standards Administration
Office of Workers' Compensation Programs
Division of Longshore and Harbor Workers' Compensation

061 LS-504 CASE #07-108275
Injury Date 11/29/85
EMPLYR Johnson Brothers Corp.
TO: Ernest D. Sharp
Rt. 15, Box 382
Slidell, LA 70461

We have received the report of the injury which you sustained on the above date, and it appears to fall under the jurisdiction of the Longshore and Harbor Worker's Compensation Act, or an extension of that law.

The Act requires your employer or its insurance company to furnish all medical, surgical, hospital treatment and supplies which are needed because of the injury. *(The term injury also includes occupational disease.)* Medical care may be furnished by and under the direction of a physician of your choice, but you must advise your employer of your choice of physician so that the treatment can be authorized. You may not select a physician or medical care provider who is currently not authorized by the Department of Labor to provide medical care or services under the Act. Upon request your employer will show you a list of such physicians and medical care providers.

If you did not lose more than three days from work, have no need for further medical care and did not sustain any permanent injury or disability, no particular action is required by you. Your case will be closed.

When an employee loses more than three days from work and has pay loss for more than three days, he/she is entitled to compensation for pay loss at the rate of two-thirds of his/her average weekly wage. The first payment of compensation is due fourteen days after your employer has knowledge of the injury and is to be paid semimonthly during the continuance of the disability. If your disability exceeds fourteen days, you are also entitled to receive compensation for the first three days of your pay loss. If you lost pay in excess of three days and did not receive a check, contact your employer. Also, please contact this office if you believe your injury has caused: (1) any permanent disability to your body, or (2) any serious disfigurement to the head, face, neck or other normally exposed areas, which may handicap you in securing or maintaining employment.

If benefits are not provided voluntarily by the employer or the insurance company, you may wish to file a written claim with this office. To protect your interest, a claim may be filed within one year following the date of injury. In cases of hearing loss, a claim may be filed within one year after receipt by an employee of an audiogram, with the accompanying report thereon, indicating that the employee has suffered a loss of hearing. In cases involving occupational disease which does not immediately result in death or disability, a claim may be filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. If compensation payments have been made and you feel you are entitled to additional benefits, a claim must be filed within one year from the date of the last payment. Failure to file a written claim within these time deadlines may result in loss of your right to benefits.

Please contact this office if you have questions concerning your entitlement to benefits. Refer to the file number at the top of this letter to identify your case.

IMPORTANT NOTICE

Section 31 (a)(1) of the Longshore Act, 33 U.S.C. 931 (a)(1), provides, as follows: Any claimant or representative of a claimant who knowingly and willfully makes a false statement or representation for the purpose of obtaining a benefit or payment under this Act shall be guilty of a felony, and on conviction thereof shall be punished by a fine not to exceed $10,000, by imprisonment not to exceed five years, or by both.

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workers' Compensation Programs
Division of Longshore and Harbor Workers' Compensation
701 Loyola Avenue, Room 13032
New Orleans, LA 70113

October 5, 1989

File No.: 7-102714
Re: Ernest Sharp
INJ: 11/29/85
EMPLOYER: Johnson Bros. Corp.

Mr. Ernest Sharp
Employers Insurance of Wausau
Kevin Galatas, Esquire
Joseph Guilbeau, Esquire
Honorable Richard D. Mills

Gentlemen:

The enclosed Decision and Order of the Administrative Law Judge is hereby served upon the parties to whom this letter is addressed. The decision was based on all of the evidence of record, including testimony taken at a formal hearing, and on the assumption that all available evidence has been submitted.

The transcript, pleadings, and compensation order has been dated and filed in the Deputy Commissioner's Office. Procedures for appealing are described on the back of this letter.

The employer/insurance carrier is hereby advised that if the order awards compensation benefits the filing of an appeal

does not relieve that party of the obligation of paying compensation as directed in this order. The employer/insurance carrier is also advised that an additional 20 percent is added to the amount of compensation due if not paid within ten days, notwithstanding the filing of an appeal, unless an order staying payments has been issued by the Benefits Review Board, U.S. Department of Labor, 1111 - 20th Street, N.W., Suite 757, Washington, D.C. 20036.

Sincerely,

[s] Donnett Glenn
Donnette S. Glenn
Deputy Commissioner

Enclosure

RECEIPT, RELEASE, INDEMNITY AND DISTRIBUTION OF LITIGATION PROCEEDS AGREEMENT

WHEREAS, on or about November 29, 1985, Ernest D. Sharp was employed by Johnson Brothers Corporation as a welder/pile driver aboard a group of barges and other vessels engaged in a repair project of the Lake Pontchartrain Railroad trestle; and

WHEREAS, on or about November 29, 1985, while acting in the course and scope of that employment, Ernest D. Sharp allegedly injured his left ankle, knee, neck and lower back when a load being transferred overhead by a barge-mounted crane fell upon him while he was located on the bow of a tug boat in Lake Pontchartrain; and

WHEREAS, Ernest D. Sharp has undergone extensive medical treatment and/or examination by Dr. Krieger, Dr. John Manale, Dr. G. Gernon Brown and other physicians for injuries to his left ankle, left knee, lower back and neck and other parts of his mind or body; and

WHEREAS, the undersigned, Ernest D. Sharp has brought suit against his employer, Johnson Brothers Corporation and its insurers, Employers Insurance of Wausau, St. Paul Fire & Marine Insurance Company and Centennial Insurance Company for damages as a result of the aforementioned accident and injuries in an action entitled "Ernest D. Sharp v. Johnson Brothers Corporation, et al," Civil Action No. 86-5005, Section "K" in the United States District Court for the Eastern District of Louisiana, liability being specifically denied by Johnson Brothers Corporation and Employers Insurance of Wausau; and

WHEREAS, Brenda Sharp, also undersigned, is presently married to Ernest D. Sharp and was so married to him on the date of the aforesaid accident and is now his only and lawful wife; and

WHEREAS, in recognition of the significant dispute regarding the classification of amphibious workers like the

undersigned, Ernest D. Sharp, within the correct legal status as "Jones Act seaman", or alternatively, "a maritime employee" entitled to recover under the Longshore and Harbor Workers' Compensation Act ("LHWCA") or in the further alternative, an employee entitled only to recover under the appropriate state's workers' compensation system, and the legal right of such amphibious workers with ambiguous status to simultaneously pursue mutually exclusive remedies, in particular, a seaman's remedies of the Jones Act, 46 U.S.C. Section 688, and general maritime law for unseaworthiness and maintenance and cure, as opposed to the Longshore and Harbor Workers' Compensation Act, which precludes claims by Jones Act seamen; and

WHEREAS, in recognition of the legal right that workers such as Ernest D. Sharp, undersigned, has to have a jury of his peers determine whether he is in fact a Jones Act seaman entitled to a seaman's remedies; and

WHEREAS, following Ernest D. Sharp's accident, pursuant to a policy of insurance issued to Johnson Brothers Corporation, Employer's Insurance of Wausau paid certain weekly compensation benefits and medical expenses to or on behalf of Ernest D. Sharp in the amount of $39,698.75 and $35,661.86, respectively, for a total of $75,360.61, to which he may have been entitled under the LHWCA until such benefits were terminated; and

WHEREAS Ernest D. Sharp has settled all rights and claims he may have had against Johnson Brothers Corporation and its worker's compensation carrier, Employers Insurance of Wausau, for worker's compensation and other statutory benefits under the Longshore and Harbor Workers' Compensation Act pursuant to a separate settlement application filed in accordance with 33 U.S.C. §908(i) of the LHWCA in exchange for a lump sum payment of $200,000.00, which application has been approved and which money has been tendered in accordance therewith, all of which is acknowledged hereto by the undersigned; reserving all rights to pursue any parties who may be

liable to him for non-statutory claims (that is, claims other than for worker's compensation or other statutory benefits) he may have in accordance herewith; and

WHEREAS, in order to avoid the costs and uncertainties of further litigation for non-statutory remedies the undersigned, Brenda Sharp, Ernest D. Sharp, his employer, Johnson Brothers Corporation, and its compensation carrier, Employers Insurance of Wausau, have agreed to adjust and settle their remaining differences on the basis hereinafter set forth;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS:

That for and in consideration of the full sum of TWENTY FIVE THOUSAND AND NO/100 ($25,000.00) DOLLARS which is hereby paid by Employers Insurance of Wausau on its sole behalf pursuant to a policy of insurance issued by Employers Insurance of Wausau to Johnson Brothers Corporation in effect on the date of Ernest D. Sharp's accident and in further consideration of the additional payment of TWO HUNDRED THOUSAND AND NO/100 ($200,000.00) DOLLARS which has previously been paid to Ernest D. Sharp by Employers Insurance of Wausau for its own behalf and that of Johnson Brothers Corporation in accordance with the terms of an approved 33 U.S.C. §908(i) settlement application, both of which payments are hereby acknowledged by the undersigned and due acquittance and discharge therefor granted, the said Ernest D. Sharp and Brenda Sharp, for themselves, their heirs, assigns and personal representatives, DO HEREBY RELEASE, REMISE AND FOREVER DISCHARGE Employers Insurance of Wausau, including its agents, servants, employees, officers, managers, stockholders, directors, underwriters, successors, assigns of and from any and all rights, claims, liens, remedies or causes of action of whatever nature which they or their heirs now have or which they, their heirs, assigns, or legal representatives may hereafter acquire, for damages, costs, expenses, loss of earnings, loss of society, loss of consortium, pecuniary and non-pecuniary dam-

ages, pain, suffering or disability, including the aggravation of any prior or pre-existing condition, arising out of or in any way connected with the aforementioned accident and/or injuries, including, without limitation, all claim under the Jones Act (46 U.S.C. Section 688), the laws of the State of Louisiana or any other state or nation, the Longshore and Harbor Workers' Compensation Act (33 U.S.C. Section 901, et seq.) the admiralty and maritime laws of the United States or any other nation, or any other loss which may afford them or their heirs a right or cause of action based upon any claim of unseaworthiness of any of the vessels involved with his employment with Johnson Brothers Corporation or the aforementioned accident including, claims for punitive damages, or for past or future maintenance and cure or damages, including attorney's fees and punitive damages for failure to pay or timely pay maintenance and cure, including punitive damages for wanton, willful, or malicious acts or conduct, or under any compensation statute, federal or state, or negligence, or otherwise in tort, civil or maritime or for retaliatory discharge and whether on account of or in any way connected with the alleged accident and injuries, as aforementioned, and whether the same be now known or hereafter discovered.

The undersigned Ernest D. Sharp and Brenda Sharp warrant that they have discussed Ernest D. Sharp's physical and medical condition with physicians of his own choosing and are fully aware of the medical and physical condition and of the prognosis for the future. They further warrant that after discussing his present and perspective medical and physical condition with physicians of their own choosing, they are fully aware that his condition may grown worse than it is or seems to be; that in executing this Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement, THEY ARE COMPLETELY GIVING UP AND DISCHARGING ANY AND ALL RIGHTS against Employers Insurance of Wausau as set forth herein and that they are desirous of accepting the sum of TWENTY FIVE THOUSAND AND NO/100 ($25,000.00) DOLLARS paid pur-

suant to this agreement in full settlement and discharge of all legal rights arising out of or resulting from the alleged accident and/or accidents and injuries as aforementioned, and are of the opinion that this settlement is reasonable and proper under the circumstances.

It is further understood and agreed by the undersigned parties and the parties being released hereto that Ernest D. Sharp intends to pursue such remedies as may be available to him from Johnson Brothers Corporation insofar and only to the extent that it may be insured by St. Paul Fire & Marine Insurance Company and by Centennial Insurance Company as well as such remedies as may be available to him from St. Paul Fire & Marine Insurance company and Centennial Insurance Company individually, as well as against such other parties, persons, firms or corporations who may have some responsibility to the undersigned as a result of the aforementioned accident. To the extent necessary, the undersigned reserves such rights as they have or may have against these persons, corporations or insurers. In connection with this reservation of rights, all parties to this release agree that it is not the intention of any party that this release run in favor of any person, firm or corporation not specifically a party hereto. However, and in connection with this reservation of rights and in exchange for the aforementioned valuable consideration, it is the express intention of the undersigned to continue the prosecution of such claims as they have or may have against such other persons, firms, corporations, or insurers as set forth above, the undersigned agree to defend, indemnify and hold completely harmless Johnson Brothers Corporation insofar and to the extent it is insured by Employers Insurance of Wausau or to the extent it is uninsured by either St. Paul Fire & Marine Insurance Company and/or Centennial Insurance Company, individually of and from any and all claims and demands which may be made against it by any person, firm, corporation or insurer as a result of the aforementioned accident and litigation or any document, contract, insurance policy or other thing related thereto, and in

connection with this undertaking, agree that the attorney representing the undersigned shall proceed to the defense of Johnson Brothers Corporation and Employers Insurance of Wausau in their above capacities in the event that suit is filed or claim otherwise is made against Johnson Brothers Corporation and Employers Insurance of Wausau in their above capacities.

In connection with the reservation of rights and express intention, the undersigned agree and covenant not to sue Johnson Brothers Corporation except insofar as it may be insured by St. Paul Fire & Marine Insurance Company and/or Centennial Insurance Company and not to sue Employers Insurance of Wausau in any capacity; and agree and covenant not to enforce any judgment they may receive as a result of the above reservation of rights insofar as such may require any payment by Johnson Brothers Corporation that is not uninsured or to be reimbursed by St. Paul Fire & Marine Insurance Company and/or Centennial Insurance Company; and/or any payment by Employers Insurance of Wausau in any capacity or manner whatsoever.

It is expressly understood and agreed that the payment herein referred to is made purely by way of compromise and settlement and is in no way to be construed as an admission of liability on the part of any party hereto.

DISBURSEMENT PROVISIONS

In exchange for the valuable consideration aforementioned, in the event any monetary proceeds are obtained through judgment or settlement of any claim of whatsoever type or nature, including but not limited to, any claim preserved to the undersigned by 33 U.S.C. § 905(b) as a result of the above reservation of rights, the undersigned do hereby agree to the following disbursements of such proceeds:

a. the undersigned shall first pay their attorney, Kevin A. Galatas, his contingency fee of 40% plus $15,000.00 which is

stipulated to be the reasonable litigation expenses incurred as of this date pursuant to prior litigation arising out of the aforementioned accident plus all additional expenses reasonably and directly incurred in further pursuit of litigation pursuant to the reservation of rights in the future, minus any amount that might be taxed as costs by the court in which such further litigation is pursued;

b. from the remaining proceeds, the first $225,000.00 shall be paid by the undersigned directly to Employers Insurance of Wausau, acknowledging that if the proceeds are insufficient to pay the full $225,000.00 to Employers Insurance of Wausau, then the entire amount of any such remaining proceeds after deduction of those items in accordance with "a." above shall be paid to Employers Insurance of Wausau;

c. thereafter, if there shall be any remaining proceeds, the next $25,000.00 shall be retained by the undersigned;

d. thereafter, if there should be any remaining proceeds, the next $75,360.61, representing the amount of past compensation and medical benefits paid to or on behalf of Ernest D. Sharp by Employers Insurance of Wausau in weekly compensation and medical benefits that may have been owed under the LHWCA, shall be returned to Employers Insurance of Wausau regardless of whether such payments are deemed to have actually been owed to Ernest D. Sharp;

e. thereafter, any remaining proceeds shall be retained by the undersigned;

f. furthermore, the undersigned shall not settle any claims against any parties whatsoever to which their rights to pursue were reserved without the express, written consent of Employers Insurance of Wausau. If any such claims are settled without the express, written consent of Employers Insurance of Wausau then the entire amount of any such settlement proceeds shall be immediately payable to Employers Insurance of Wausau without benefit of demand, notice or requirement default. The undersigned do hereby also agree that if it is necessary for Employers Insurance of Wausau to retain the services of an attorney or otherwise incur legal expenses in enforcing this provision against the undersigned, then the undersigned shall pay all such associated litigation costs, including a reasonable attorney's fee.

NOW COMES Brenda Sharp, in further consideration of the aforesaid payment and in recognition of the consideration paid pursuant to the separate and independent 33 U.S.C. §908(i) settlement and without litigation joins and adopts all and singular, this Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement, and all its undertakings and obligations with respect to any and all rights, claims, liens, remedies or causes of action of whatever nature she may have with respect to her marriage to Ernest D. Sharp or which their heirs, assigns or legal representatives, now have or may hereafter acquire for loss of society, loss of services, loss of consortium, pain and suffer-

ing, pecuniary and non-pecuniary damages of any description, arising out of or in any way connected with the aforementioned accident and injuries to Ernest D. Sharp.

It is expressly understood and agreed that the payment herein referred to is made purely by way of compromise and settlement and is in no way to be construed as an admission of liability on the part of any party hereto.

IN WITNESS WHEREOF, this Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement has been executed in multiple originals in the presence of the undersigned witnesses at New Orleans, Louisiana, this 5th day of October, 1989.

WITNESSES:

[s] Joseph B. Guilbeau _____ [s]Ernest D. Sharp
ERNEST D. SHARP

[s]Sandra Tomlinson _____ [s]Brenda F. Sharp
BRENDA SHARP

SWORN TO AN SUBSCRIBED
BEFORE ME THIS 5TH
DAY OF OCTOBER, 1989.

[s] Kevin Galatas
NOTARY PUBLIC

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

ERNEST D. SHARP

who, after first being duly sworn, did depose and say:

That he is the person who executed the above and foregoing Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement;

That he has read same and understands its consequences;

That all of his rights under the Jones Act, the general maritime law, including wages, maintenance and cure and a warranty of seaworthiness, under the laws of the United States of America and the State of Louisiana and under federal and state compensation acts have been fully explained to him by his attorney, Kevin A. Galatas, and that he fully understands all of these rights and that he accepts the amount stated in said Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement, in full and final settlement of all claims;

That he has signed said Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement and executed it as his own free act and deed.

[s]Ernest D. Sharp
ERNEST D. SHARP

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 5TH DAY
OF OCTOBER, 1989.

[s] Kevin Galatas
NOTARY PUBLIC

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

BRENDA SHARP

who, after first being duly sworn, did depose and say:

That she is the person who executed the above and foregoing Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement;

That she has read same and understands its consequences;

That all of her rights under the Jones Act, the general maritime law, including wages, maintenance and cure and a warranty of seaworthiness, under the laws of the United States of America and the State of Louisiana and under federal and state compensation acts have been fully explained to her by her attorney, Kevin A. Galatas, and that she fully understands all of these rights and that she accepts the amount stated in said Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement, in full and final settlement of all claims;

That she has signed said Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement and executed it as her own free act and deed.

[s]Brenda F. Sharp
BRENDA SHARP

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 5TH DAY
OF OCTOBER, 1989.

[s]Kevin Galatas
NOTARY PUBLIC

CERTIFICATE OF PLAINTIFF'S ATTORNEY

I, Kevin A. Galatas, attorney for Ernest D. Sharp and Brenda Sharp, do hereby declare that I have explained to each all rights which each may have as a result of the accident sustained by Ernest D. Sharp on or about November 29, 1985, and the consequent injuries including, but not limited to, the Jones Act, the general maritime law, the laws of the United States of America, the State of Louisiana, the Longshoremen's and Harbor Worker's Compensation Act, the Louisiana Workmen's Compensation Act, and all other rights which each may have; that I have recommended to them the settlement set forth in the attached Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement; and that I am satisfied that they fully understand my advice and that each has executed the foregoing Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement voluntarily and with full knowledge of the consequences of this Receipt, Release, Indemnity and Distribution of Litigation Proceeds Agreement.

[s]Kevin A. Galatas
KEVIN A. GALATAS

WITNESSES:

[s]Joseph B. Guilbeau

[s]Sandra Tomlinson

STATE OF MISSISSIPPI
COUNTY OF HANCOCK

AFFIDAVIT

Before me, the undersigned authority, personally came and appeared:

ROBERT W. BREEDEN, JR.

who, being duly sworn, did depose and say:

My name is Robert W. Breeden, Jr., age sixty-two, and I reside at 978 S. Beach Boulevard, Bay St. Louis, Mississippi 39520.

I was employed in the insurance business for approximately thirty-five years as an underwriter, agent, and broker handling primarily ocean marine casualty and property insurance. I have been a member of the Society of Property and Casualty Underwriters since 1956. I have been an instructor of insurance at Loyola University in New Orleans and have taught various courses dealing with ocean marine, casualty and liability insurance at seminars sponsored by Tulane University, the International Trade Mart, and the Society of Property and Casualty Underwriters. During my professional insurance career I handled numerous maritime clients' insurance business affairs and was familiar with the form of policies used as well as industry custom and practice. I held an Unlimited Chief Mate's License (any tonnage, any ocean), issued by the U.S. Coast Guard, from October 1946 until September 1986.

I have qualified as an expert in the field of Marine, Casualty and Property Insurance in various state and federal courts, including the Eastern and Western Districts of Louisiana, Northern District of Mississippi, Tennessee, the State of Louisiana, the State of Mississippi, and the State of Oklahoma.

I have reviewed the following:

1. A copy of Employer's of Wausau Worker's Compensation and Employer's Liability Policy No. 03170405 8109, effective from April 1, 1984 to April 1, 1987 and issued to Johnson Bros. Corporation, et al.

2. A copy of St. Paul Fire and Marine Insurance Company Protection and Indemnity Policy No. 322JA0124, effective from April 1, 1985 to April 1, 1986 and issued to Johnson Bros. Corporation, et al.

3. A copy of Excess Protection and Indemnity Policy No. 332JA0126, effective from April 1, 1985 to April 1, 1986, and issued to Johnson Bros. Corporation, et al.

4. A copy of Corroon & Black of Louisiana, Inc. advice of insurance dated May 7, 1985 and issued to Johnson Bros. Construction Corporation, along with a copy of applicable portions of Centennial Insurance Company Protection and Indemnity Policy No. 1230014185090 issued to Central Marine Service, Inc. and others.

5. A copy of Answers to Interrogatories of plaintiff and defendant.

6. A copy of Wausau Insurance Company's Umbrella Liability Policy No. 0327 02 058109, effective from April 1, 1984 to April 1, 1987 and issued to Johnson Bros. Corporation, et al.

Based upon my experience as outlined above, and the custom, practice and usages of the insurance business, it is my opinion that:

a. Any exposure of Johnson Bros. to the claimant Mr. Sharp is insured by the St. Paul Protection and Indemnity Policy No. 322JA0124 and Excess Protection and Indemnity Policy No. 322JA0126. (I understand that St. Paul has admitted coverage without reservation of rights and is actively defending Johnson Bros.)

b. Additional insurance coverage for Johnson Bros. is provided by the Wausau Workers' Compensation and Employment Policy No. 031704058107, and Umbrella Policy No. 032702058109 and it is my opinion that coverage of these policies will depend upon whether Mr. Sharp is a "seaman" or "not a seaman."

If Mr. Sharp is not a seaman, the Workers' Compensation & Employers Liability Policy No. 031704058107 and Excess Policy No. 032702058109 will provide protection to Johnson Bros:

If I assume that the claimant is "not a seaman" then I believe that:

1) His claim is covered under State or Federal Workers' Compensation Statutes and would be covered by the policies named in paragraph "b" above,

2) If his claim is allowed under §905(b) of the Longshore Act there will be coverage for it under the Employers Liability section of the policies named in paragraph "b" above.

If I assume that the claimant is a "Seaman" then I believe that his claim would be covered under policies enumerated in

paragraph "b" above only if he is found not to be "a master or member of the crew of any vessel."

My reason for reaching this conclusion is that Coverage B "Employers Liability" in its standard form encompasses all claims by employees against their employer which include Jones Act and claims of seamen under the general admiralty law.

Wausau's Policy No. 031704058107 contains a "maritime exclusion endorsement" which should be subject to strict interpretation against the insurer since it is an exclusionary endorsement rather than an extension of policy coverage. This is particularly true regarding the question of whether the term "master or member of the crew of any vessel" is identical to the term "seaman". In the insurance industry the term "master or member of the crew of any vessel" has been used for many years and was placed in policy forms similar to those attached to the Wausau Policy No. 031704058107 so as not to exclude "Sieracki Seamen" prior to the amendment of the USLHWCA in 1972. It was not intended that this wording "master or member of the crew of any vessel" have the same meaning as "seaman" since insurers did not intend to exclude "status seamen" in the maritime exclusion endorsement. This position of the insurance industry is confirmed by the attached copy of letter dated June 10, 1974 from the National Council on Compensation Insurance addressed to Insurance Commissioner Sherman Bernard and copy of the Circular to members and subscribers from the National Council on Compensation Insurance dated July 12, 1974. In 1974 affiant raised the question of the meaning of "master and member of the crew of any vessel" with the National Council on Compensation Insurance. Their letter of September 9, 1974, copy attached, confirmed again that only "per se seamen" were intended to be excluded.

If the insurer wished to exclude "seamen" the insurer could have worded the exclusion endorsement using the word "seamen" if such had been the intention.

Further, I note that the "Maritime Coverage Endorsement" attached to the policy, which was drafted in 1984 refers to "a vessel" rather than "any vessel." This endorsement also refers to injury and death of "master and members of the crew if a vessel." It is an endorsement which limits rather than extends coverage and therefore if strictly construed against insurer would not apply to coverage for Mr. Sharp's claim for the same reasons mentioned above plus the fact that Mr. Sharp did not work on any one vessel.

The Wausau policy was prepared with standard forms that I recognize, which include the "maritime exclusion endorsement" and the "maritime coverage endorsement" which were prepared for the insurance industry by the National Council on Workers' Compensation Insurance. All insurance companies use these forms.

Mr. Sharp's work aboard several barges in the repair of a bridge no doubt gives him the right to claim benefits due a seaman. However, I do not believe that such work makes him a "master or member of the crew of any vessel" as that term is used in its most restrictive sense in the exclusion of an insurance policy. Neither would he be required to have "seamen's papers".

It is for the foregoing reasons that I conclude that the Wausau policies provide Johnson Bros. with coverage for any and all claims asserted by Mr. Sharp in this litigation.

My reasons for concluding that there is no coverage for Johnson Bros. under the Centennial P&I policy for the claims asserted by Mr. Sharp are as follows:

1.) The P&I policy covers the liability of the insured as owner of the vessel. The form of the policy makes it a vessel liability coverage and furnishes protection for liabilities which are directly related to the vessel's operation but does not extend coverage to any assured for liabilities not directly related to the operation as a vessel. In the case of Mr. Sharp it appears that the spud barge was not being operated as a vessel but

was simply a work platform on which a crane was operating in the repair of the bridge.

2.) Centennial insured "spud barges" which are unmanned, unpowered vessels and not crane barges. Even if the Centennial P&I coverage were extended to cover Johnson Bros.' crew exposure, which I think is questionable, there would still be no coverage under the policy for Johnson Bros. since a spud barge is uniformly recognized as an unmanned vessel without a crew. Furthermore, even if the Centennial P&I policy had been amended to cover a "crane barge," the operations of the crane in bridge repair would still have required that Johnson Bros. (to be protected) carry and pay for both Workers' Compensation and Employers' Liability and Comprehensive General Liability insurance policies to provide coverage for those liabilities which do not involve the operation of the spud or crane barge as a vessel and for workers' compensation and other employers' liability exposures not covered by the P&I insurance. This additional coverage was in fact carried by Johnson Bros. and I assume this was done for their protection.

3.) The operation of a crane barge as a vessel presents substantially greater P&I insurance risks than does the operation of unmanned spud barges and consequently if covered would require the payment of a much higher P&I insurance premium. Risk of claims resulting from the operations of a crane barge which are in addition to the risks of claims which might arise from the operations of an unmanned spud barge are not insured by the P&I insurance on a spud barge. If a spud barge is to be used as a crane barge it would be necessary to report the change in operation to the P&I underwriters and perhaps to pay an additional premium.

4.) I see no evidence that the Centennial insurance policy was amended other than to include Johnson Bros. as an "additional insured." There was not any change in the risk description to change spud barge to crane barge nor extension of coverage to insure Johnson Bros. crew and employees.

5.) Deck or spud barge rental firms usually will routinely include charterers as additional insured in the insurance on the barge but at the same time, in my experience, they uniformly exclude from the P&I coverage liability of the charterer to the charterer's crew and employees. This is the standard procedure since in most cases the charterer already has insurance coverage which will cover or can be extended to cover his employees respecting the work they perform. The extension of the P&I coverage on the barge to include crew and employees of charterer will not completely solve the charterer's problems with respect to the need for additional proper insurance. It would be misleading because of the "escape type" "other insurance clause" found in all P&I policies. The difference in exposures of various charterers also requires special underwriting consideration in order to provide P&I coverage on employees of charterers.

Here, this is exactly what was done because Johnson Bros. had their crew coverage insured by the Wausau and St. Paul policies. The charter party required that Johnson Bros. indemnify the owner of the spud barge for all personal injury and death claims of the crew. This contractual liability undertaken by Johnson Bros. is probably insured by the Firemen's Fund Comprehensive General Liability policy No. 97 GTW-71197, referred to in the Umbrella policy or under the Wausau Umbrella Policy No. 032702058109.

In the event that a court would find that Johnson Bros. was covered by the Centennial Policy for the claims of Mr. Sharp, then the "other" insurance clause of the Centennial policy would have to be considered in light of all coverages in the insurance policies of Johnson Bros. enumerated above.

In this case, I note that the Johnson Bros. Wausau policies are subject to a retrospective premium adjustment which means that the final costs of the Wausau policies are based upon the amount of claim payments made under these policies. Consequently, Johnson Bros. probably would like to avoid any payments respecting Mr. Sharp's claims under the Wausau policies and thus save themselves from the payment of higher premiums.

[s]Robert W. Breeden, Jr.
ROBERT W. BREEDEN, JR.

SWORN TO and subscribed)
before me this 7th day)
of April 1988.)
[s]Marie T. Johnson
Notary Public